

United States 10
Circuit Court of Appeals
For the Ninth Circuit.

RALPH MURPHY and DONALD GALLAHER,
Appellants,

vs.

WARNER BROS. PICTURES, INC., a corpora-
tion,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

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PAUL F. O'BRIEN,
CLERK



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RALPH MURPHY and DONALD GALLAHER,
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Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

THE
HISTORY OF THE
CITY OF BOSTON
FROM 1630 TO 1800
BY
JOHN H. COOPER

BOSTON: PUBLISHED BY
J. B. ALLEN, 1850.

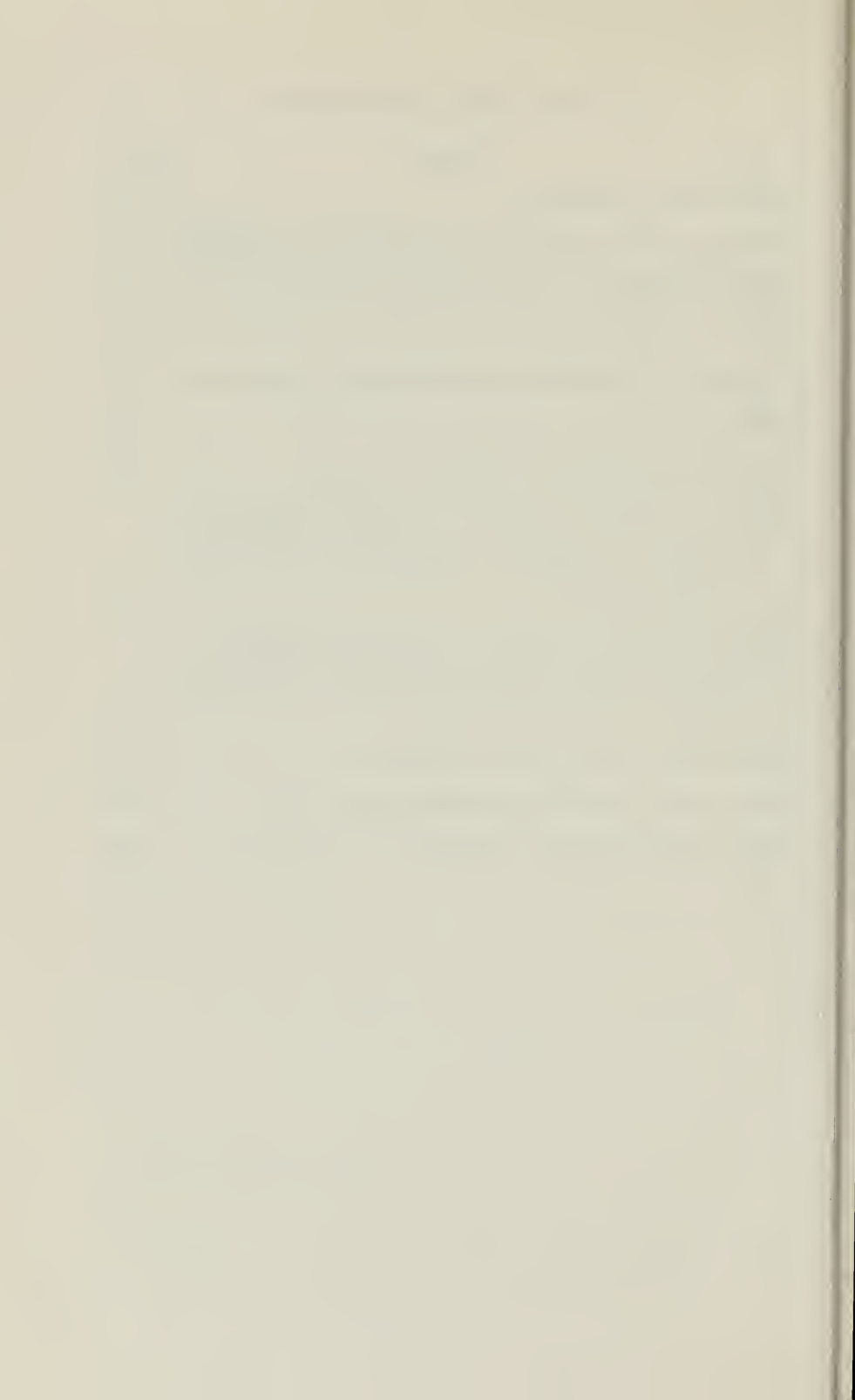
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS.

For Appellants:

ROGER MARCHETTI, Esq.,
HAROLD A. FENDLER, Esq.,
1111 Pershing Square Building,
448 S. Hill Street,
Los Angeles, California.

For Appellees:

FRESTON & FILES, Esqs.,
RALPH E. LEWIS, Esq.,
JOHN P. MCGINLEY, Esq.,
1010 Bank of America Building,
650 S. Spring Street,
Los Angeles, California. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States Southern
District of California, Central Division.

No. 1306-H

RALPH MURPHY and DONALD GALLAHER,
Plaintiffs,

vs.

FIRST NATIONAL PICTURES, INC., a corpo-
ration, and WARNER BROS. PICTURES,
INC., a corporation, et al.,

Defendants.

AMENDED COMPLAINT FOR INFRINGE-
MENT OF COPYRIGHT.

Now come the above named plaintiffs and by
leave and permission of Court first had and ob-
tained, file their amended complaint herein and for
cause of action against the defendants above named
and each of them allege as follows:

I.

That at all times herein mentioned defendants
Warner Bros. Pictures, Inc. and First National
Pictures Inc. were and are now corporations duly
organized and existing under and by virtue of the
laws of the State of Delaware and duly authorized
and qualified to do business in the City of and
County of Los Angeles, State of California.

II.

That the defendants John Doe Corporation, Jane Doe Corporation, John Doe and Jane Doe are sued herein by their fictitious names because their true names are unknown to the plaintiffs and plaintiffs ask leave and permission of this Court to insert the true names of said defendants if and when ascertained by plaintiffs.

III.

That the plaintiffs Ralph Murphy and Donald Gallaher [2] are residents and citizens of the United States of America domiciled within and residing in the above named judicial district in the County of Los Angeles, State of California.

IV.

That the jurisdiction of this Court is invoked by reason of the diversity of citizenship hereinabove referred to and also by reason of the copyright laws of the United States of America.

V.

That prior to the 9th day of December, 1927 the plaintiffs herein who were then and ever since have been citizens of the United States, invented, originated, composed, created and wrote an original and dramatic composition and play entitled "The Nightmare" containing a large amount of literary and dramatic material wholly original, with the plaintiffs and containing wholly copyrightable subject matter under the laws of the United States.

VI.

That on or about the 9th day of December, 1927 plaintiff Ralph Murphy, on behalf of himself and his co-plaintiff Donald Gallaher and for their joint use, benefit and ownership, complied in all respects with the copyright act of 1909 as amended and all other laws covering copyright and secured the exclusive rights and privileges inhering in the owner of the copyright and said dramatic composition and play then entitled "The Nightmare" by depositing the same with the Registrar of Copyrights as an unpublished dramatic composition as provided by law and plaintiff Ralph Murphy received from the Registrar of Copyrights a certificate of registration dated and identified as follows, to-wit:

"December 9, 1927—Class D. Number 82003", and ever since the 9th day of December, 1927 plaintiffs have been the sole and exclusive owners of said copyrighted dramatic composition and play entitled "The Nightmare", (copy of which Exhibit "1" [3] is being filed concurrently herewith with the Clerk of the above entitled Court) and ever since the 9th day of December, 1927 plaintiffs have been the sole proprietors of all rights, title and interest in and to said copyright and particularly in and to all dramatic rights, radio and television rights, talking rights and dialogue rights therein and thereto.

VII.

That after the 9th day of December, 1927, and particularly during the years 1937 and 1938 de-

defendants and each of them infringed upon said copyright by the production, reproduction, distribution, sale, lease and exhibition generally in the State of California within the above named judicial district and elsewhere throughout the world, a dialogue and talking motion picture photoplay entitled "Sh! The Octopus" which was copied largely from plaintiffs' said dramatic composition and play entitled "The Nightmare" and which was subsequently produced upon the stage under the title of "Sh! The Octopus".

VIII.

That plaintiffs have notified defendants and each of them that defendants have infringed upon plaintiffs' copyright but defendants and each of them continue to infringe upon said copyright.

And for a second and separate cause of action plaintiffs complain and allege as follows:

I.

Plaintiffs hereby adopt and by this reference incorporate each and every allegation alleged and set forth in paragraphs I, II and III of plaintiff's first cause of action the same as if fully set forth at length herein.

II.

That at all times herein mentioned the plaintiffs Ralph [4] Murphy and Donald Gallaher were and are now authors and writers and prior to the 14th day of February, 1928 invented, originated, com-

posed, wrote and created a certain original literary and dramatic composition and play originally entitled "The Nightmare" but subsequently entitled "Sh! The Octopus"; and at all times since said date plaintiffs have retained said literary and dramatic composition and play in manuscript form and have not published or dedicated the same in any manner whatsoever and at all times herein mentioned have, and now retain each and all of the literary and dramatic rights and all other rights therein and thereto solely excepting certain motion picture rights hereinafter more particularly referred to in paragraphs numbered "IV" and "V" hereof.

III.

That on or about the 14th day of February, 1928, and for a considerable period of time thereafter in the City and County of and State of New York, said dramatic composition was produced as a play under the title of "Sh! The Octopus" by the plaintiffs herein and the M. & G. Amusements Inc., a New York corporation, as producing manager for the plaintiffs herein; but since long prior to the filing of this action said corporation owned or held no right, or title or interest in or to said dramatic composition or in or to either of the causes of action alleged herein for infringement of copyright or misappropriation or unauthorized use of the dialogue of said dramatic composition and play in "talking" motion pictures produced by the de-

fendant Warner Bros. Pictures, Inc., and these plaintiffs are the sole owners and holders of each and all said causes of action.

IV.

That on or about the 30th day of April, 1928, in the City of and County of and State of New York, plaintiff herein and said M. & G. Amusements Inc. did grant, license, and sell to defendant First National Pictures, Inc. motion picture rights in and to said literary and dramatic composition together with the [5] right to utilize music or orchestration or sounds in conjunction therewith and a copy of said agreement marked Exhibit "A" is attached hereto and by this reference incorporated herein.

That said agreement was made and entered into in the State of New York and it was expressly agreed in Paragraph 10 thereof that each and every term of said agreement should be construed in accordance with the laws of the United States and of the State of New York. That at the time said agreement was executed and at the time said motion picture rights were granted by plaintiffs to said defendant corporation there were in existence and generally known to and throughout the motion picture trade and industry three distinct separate sets and classifications of literary and dramatic rights which were at said time and place the subject of barter, purchase and sale throughout said trade and industry as follows, to-wit:

“Motion Picture Rights”, to-wit:

(1) The right to use literary or dramatic compositions in motion pictures.

“Sound Rights”, to-wit:

(2) The right to utilize sound effects in connection with the use of literary or dramatic compositions in motion pictures.

“Dialogue rights” and “Talking rights”, to-wit:

(3) The right to use speech and dialogue in connection with literary or dramatic compositions produced in the form of “talking” motion pictures; and there was on the day said contract was entered into as aforesaid a general, uniform, well-recognized, trade custom and trade usage in the motion picture industry to purchase and/or sell the particular class or classification of motion picture rights so desired to be purchased or sold and in said motion picture trade and industry at said time and place there was a general trade usage and custom that the sale, license [6] or grant of motion picture rights did not then include sound or talking or dialogue rights unless expressly provided for and enumerated at the time of sale and that the sale, license or grant of “motion picture rights” together with right to use “sound” in conjunction therewith did not include “dialogue” and talking rights, unless expressly provided, enumerated and granted at the time of sale and said general trade usage, and customs were at said time and place well known throughout the motion picture industry and said

agreement hereinabove referred to was made and entered into by each of the parties thereto with full knowledge of said trade customs and trade usages and with the intention that the same should apply to said agreement; and none of the parties hereto intended in and by said agreement aforesaid that "dialogue" or "talking" rights should be or were included in the grant, license and sale more particularly referred to in said agreement.

V.

Plaintiffs are informed and believe and upon such information and belief allege that in 1936 or prior thereto defendant First National Pictures, Inc. duly assigned, transferred and granted to the defendant Warner Bros. Pictures Inc. all its right, title and interest in and to and under said contract dated April 30, 1928, copy of which is attached hereto, marked Exhibit "A".

VI.

That without the authority, permission or consent of the plaintiffs or either of them and in wilful, intentional, and deliberate violation of plaintiffs' rights in the premises the defendant Warner Bros. Pictures, Inc. in combination with the other defendants hereinabove named did during the year 1937 produce, and continuously thereafter to and until and including the present time, and defendants intend and advertise that they will in the [7]

future continue to, re-produce, sell, distribute, and exhibit generally in the State of California and elsewhere throughout the world a talking motion picture photoplay entitled "Sh! The Octopus" and said motion picture photoplay substantially reproduces in every part and portion thereof the speech and dialogue as well as the plot, treatment, motivation, sequences of incident and situation in each and all other parts and portions of plaintiffs' literary and dramatic composition entitled "Sh! The Octopus".

VII.

That at all times prior to and during the production, release and exhibition of said talking motion picture photoplay entitled "Sh! The Octopus" the defendants and each of them had full knowledge and notice of and concerning plaintiffs' rights in the premises and concerning plaintiffs' sole ownership of the "dialogue" and "talking" rights in and to their said literary and dramatic composition aforesaid; and defendants and each of them have at all times been notified and advised by the plaintiffs that they would be held responsible for all damages and/or profits resulting from the unauthorized use of plaintiffs' property and literary rights aforesaid.

VIII.

That by reason of the unlawful acts of defendants and each of them plaintiffs have been deprived of the exclusive rights, privileges and profits to which they are entitled as the authors and owners of the "dialogue" and "talking" rights of and in

their said literary and dramatic composition, all to their irreparable injury for which they have no adequate remedy at law.

IX.

That the value of plaintiffs' property and particularly the dialogue and talking rights referred to herein are greatly in excess of \$3,000.00 and the dialogue and talking motion picture entitled "Sh! The Octopus" produced and distributed by defendant [8] Warner Bros. Pictures Inc. is of a value in excess of \$150,000.00.

Wherefore plaintiffs pray for judgment upon their second cause of action permanently restraining and enjoining defendants and each of them from the further reproduction, sale, lease, or distribution of said talking motion picture photoplay by defendants or any of them and plaintiffs further pray for an accounting of profits realized by defendants therefrom.

Plaintiffs pray for judgment upon their first cause of action as follows:

(1) That defendants, their agents, and servants be enjoined during the pendency of this action and permanently from infringing said copyright of said plaintiffs in any manner.

(2) That defendants be required to pay plaintiffs such damages as plaintiffs have sustained in consequence of defendants' infringement of said copyright and to account and pay over to plaintiffs all the gains, profits and advantages derived by defendants from their infringement of plaintiffs'

copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes.

(3) That defendants be required to deliver up to be impounded during the pendency of this action all copies in their possession or under their control infringing said copyright and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

(4) That defendants pay to plaintiffs the costs of this action and reasonable attorney's fees to be allowed to the plaintiffs by the court.

(5) That plaintiffs have such other and further relief as is just.

ROGER MARCHETTI
HAROLD A. FENDLER
By HAROLD A. FENDLER
Attorneys for Plaintiffs.

EXHIBIT A

This agreement, made and entered into this 30th day of April 1928, by and between Donald Gallaher, Ralph Murphy and The M. & G. Amusements, Inc., a New York corporation, jointly and severally hereinafter called "Owner", and First National Pictures Inc., a corporation established under the laws of the State of Delaware, having a place of business in New York City, hereinafter called "Purchaser",

Witnesseth:

Whereas, the Owner represents that it is the sole and complete owner, without any liens or incumbrances, of the motion picture rights throughout the world in and to that certain literary material (an unpublished play) hereinafter called "writings", entitled:

"Sh! The Octopus"

written by Ralph Murphy and Donald Gallaher, originally produced at the Capitol Theater, Albany, New York, on February 14th, 1928, and later at the Royale Theater, New York, New York, on February 21st, 1928, and not yet copyrighted in the United States of America; and

Whereas, the Purchaser is desirous of acquiring all of the motion picture rights in such writings from the owner;

Now therefore, in consideration of the premises and of the mutual covenants herein contained, the parties agree as follows:

1. The Owner hereby agrees to, and by these presents does grant, bargain, sell, assign, transfer and set over (all hereinafter termed "grant") to the Purchaser, the following rights in such writings: [14]

(a) the exclusive, complete and entire motion picture rights, including common law and statutory copyright in the same, throughout the world, together with all the benefits of the copyright in such writings, the title and the theme thereof, and of all

remedies held thereunder, with respect to such motion picture rights;

(b) the exclusive right to make motion picture versions thereof and to produce and reproduce one or more motion picture photoplays, including negatives and positive prints made therefrom (all hereinafter termed "photoplays"), and to adapt, arrange, change, transpose, add to, and subtract from the said writings and the title and theme thereof to such extent as the Purchaser may deem expedient, and the exclusive right to use, in conjunction with said motion picture versions such devices for the recording and/or reproduction of sounds as may from time to time be utilized as a part of the presentation and exhibition of the photoplays, together with the right to utilize any music or orchestration, score or numbers in connection with said pictures as may be desired. Nothing herein contained shall be deemed to grant the right to utilize any device for the recording or reproduction of sounds by radio or other means than such as are utilized as a part of the entertainment connected with the projection of the pictures upon the screen, simultaneously therewith"

(c) the exclusive right to distribute, exhibit and otherwise exploit and dispose throughout the world of such motion picture versions;

(d) the exclusive right to secure copyright registration [15] and title to such photoplays in all countries of the world in its own name or otherwise;

(e) the right to use lines or excerpts from said writings for the title and/or subtitles, and/or text of said motion pictures;

(f) the exclusive right, for the purpose of advertising and exploiting such motion pictures, to publish and to use excerpts, summaries and novelizations (not to exceed 3,000 words in length) from such writings in heralds, booklets, programs, posters, lobby displays, press books, newspapers, magazines and other periodicals (as serials or otherwise) and in all other mediums of advertising and publicity whatsoever (but solely for advertising and not for commercial uses).

2. The Purchaser, in consideration of such grant, agrees to pay to the Owner the sum of Ten Thousand Dollars (\$10,000.00) in full payment for the motion picture rights herein transferred.

3. The Purchaser agrees to use the name of the authors in its paid publicity except in group advertising where two or more pictures are listed, and agrees to state upon the film itself, for exposure long enough to be read, that the motion pictures are based upon, adapted from and/or suggested by literary material, written by the authors, or words substantially to that effect.

4. The Owner warrants that:

(a) the Owner is the sole owner, among other rights, of the motion picture rights in and to the said writings; [16]

(b) the Owner has full warrant and authority to grant the rights herein contained;

(c) the aforesaid motion picture rights in and to the said writings have in no way been conveyed, granted, mortgaged, encumbered, restricted or hypothecated, or otherwise disposed of to or in favor of any other individual, firm, person or corporation whatsoever;

(d) the Owner has done no act or thing by grant or otherwise impairing such rights or that can prevent or in any manner interfere with the full enjoyment by the Purchaser of all rights granted the Purchaser hereunder;

(e) there is at the date of these presents to Owner's knowledge no litigation pending or threatened affecting the use of said writings, and/or of the title and theme thereof.

5. The Owner warrants that:

(a) the aforesaid writings are new and original with the said authors in all respects;

(b) no incident therein contained, and no part thereof, is taken from or based upon any other literary material or any dramatic work, or any motion picture, or any writing, or in any way infringes upon the copyright or the literary, dramatic or motion picture right or rights of any other individual, firm, person or corporation whatsoever;

(c) the reproduction and exhibition of such writings in photoplays will not in any way directly or indirectly infringe upon any right whatsoever

of any individual, firm, person or corporation whatsoever;

(d) the writings are not in the public domain but validly copyrighted or copyrightable in the United States [17] of America or throughout the world as original works and that the Owner and the Purchaser under this grant has the exclusive right, by reason of the original and copyrightable nature of such writings, to the motion picture rights therein.

6. The Owner guarantees and warrants that it will defend, indemnify, make good and hold harmless (all hereinafter termed "defend") the Purchaser, its successors and assigns, from any losses, damages, costs, charges, legal fees, recoveries judgments penalties and expenses or any other loss whatsoever, which may be obtained against, imposed upon or suffered by the Purchaser, its successors and assigns, by reason of any infringement or violation of any copyright, common law or statutory or any literary, dramatic or motion picture right, or from any use which the Purchaser, its successors and assigns, may make of such writings in the making of any motion picture versions thereof, the distribution or exhibition of said motion pictures, or the exercise or attempted exercise of any of the rights herein granted. It is agreed that the warranties contained in this Paragraph Sixth shall apply only to the material used in said contemplated motion pictures taken from the said writings and do

not apply to any extraneous matter inserted in said motion pictures by the Purchaser.

7. (a) The Owner agrees that it will not cause, allow or sanction any publication of such writings or any arrangement, revision or reissue thereof in any form without duly copyrighting the same in the United States of America and in any other country of the world where such publication occurs, and that it will duly confirm and grant to Purchaser, such motion picture rights, as hereinabove specified, therein. [18]

(b) The Owner agrees to duly acknowledge, execute and deliver (all hereinafter called "execute") or to procure the due execution to the Purchaser of any and all further assignments and other instruments that may be necessary or expedient to carry out and effectuate the purposes and intent of this agreement.

8. The Owner agrees to secure or have secured a renewal of such copyrights in the United States according to law at least six months before the expiration of the period of the original copyright, so that the Purchaser may be vested with the motion picture rights in such work during any renewals thereof. In the event of the failure of the Owner to do all acts necessary to obtain such renewal within the time before specified, the Owner agrees to duly execute or to procure the due execution for the Purchaser of all documents necessary to secure the renewals of such copyrights, and

hereby appoints Purchaser its irrevocable attorney in fact for the execution and filing of all such documents and the doing of all acts necessary for the obtaining of such extension.

9. The Owner hereby appoints the Purchaser its irrevocable attorney in fact (with the right to use Owner's name), but for the sole benefit of the Purchaser, to enforce and protect such motion picture rights under any and all copyrights, and to prevent infringement thereof and to litigate, collect and receipt for all damages arising from any infringement of such rights, and to join, in its sole judgment, the Owner as a party plaintiff or defendant in any suit or proceeding.

10. Each and every term of this agreement shall be [19] construed in accordance with the laws of the United States of America and of the State of New York.

11. The Purchaser may assign, transfer and grant the within rights to any individual, person, firm or corporation without limit, and may itself, or by its assigns and successors, make one or more motion pictures either as remakes or separate original pictures from such writings, in whole or in part, and shall enjoy its rights thereunder for the full duration of the copyright period of both such writings and of the photoplays made therefrom, including any renewals thereof, and to the full extent thereof, and forever so long as any rights in such writings are recognized in law or equity.

12. This agreement shall bind the parties hereto, their heirs, successors, administrators, executors and assigns.

13. The Owner hereby recognizes R. L. Giffen as its agent who has negotiated the sale terminating in this agreement. The Purchaser agrees to pay all moneys due and payable under this agreement to Joseph P. Bickerton, Jr., Arbiter, and the Owner and R. L. Giffen direct that such payment shall be made to the said Joseph P. Bickerton, Jr. and that the receipt of the said Joseph P. Bickerton, Jr. shall be a good and valid discharge of all obligations hereunder in respect to the payment of money to the Owner or to R. L. Giffen.

In witness whereof, the parties hereto have hereunto set their hands and seals and caused this agreement [20] to be signed and sealed, the day and year first above written.

THE M. & G. AMUSEMENT, INC.

(Signed) DONALD GALLAHER, Prest.

By (Signed) JACK WELCH Sec.

(Corporate Seal)

(Signed) RALPH MURPHY

(Signed) DONALD GALLAHER

FIRST NATIONAL PICTURES
INC.,

By (Signed) R. A. ROWLAND

Vice President

Attest:

(Signed) R. W. PERKINS

Secretary

(Corporate Seal)

Approved:

(Signed) JOSEPH P. BICKERTON JR.

Arbiter.

[Endorsed]: Filed Dec. 27, 1938. [21]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT.

The defendant, Warner Bros. Pictures, Inc moves the Court as follows:

I.

For a summary judgment on the ground that it affirmatively appears from the contract referred to in the amended complaint, a copy of which, marked "Exhibit A", is annexed to the Affidavit of R. W. Perkins, that by its terms it specifically grants, on the part of the plaintiffs, the right to make motion picture versions of the literary material, the subject of said contract, and any version or dramatization thereof and to record spoken words and dialogue in synchronism or timed relation with the photographing of any such motion picture version and the right to reproduce and make audible the said spoken words and dialogue in synchronism

or timed relation with the projection on screens and to publicly perform and reproduce motion picture versions and dramatizations of said literary material by means of motion picture and spoken words and dialogue recorded and reproduced in synchronism or timed relation therewith by mechanical or electrical means, contrary to [10] the claim of the plaintiffs as in their amended complaint and prayer set forth.

II.

For a summary judgment on the ground that said contract was interpreted, by the duly authorized agents of the parties thereto, as appears by "Exhibit B", "Exhibit C" and "Exhibit D" annexed to the Affidavit of R. W. Perkins, as specifically granting the right on the part of the plaintiffs of both talking and picture rights in and to the literary material in said amended complaint referred to.

III.

For a summary judgment on the ground that the allegations of the amended complaint are at variance with the instruments in writing upon which said amended complaint is predicated.

IV.

For a summary judgment on the ground that it affirmatively appears from a reading of the said contract that no cause of action is stated or can be stated by the plaintiffs for the relief sought by them.

V.

For a summary judgment on the further ground that there is no genuine issue as to any material fact.

Dated at Los Angeles, California, this 6th day of January, 1939.

JOHN P. MCGINLEY

Solicitor for defendant, Warner
Bros. Pictures, Inc.

FRESTON & FILES,
650 South Spring Street,
Los Angeles, California,
Of Counsel. [11]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION BY
WARNER BROS. PICTURES, INC. FOR
SUMMARY JUDGMENT.

State of New York,
County of New York—ss.

I, R. W. Perkins, on my oath depose and say:

That I am General Counsel of Warner Bros. Pictures, Inc., and in the year 1928 was General Counsel of First National Pictures, Inc.; that "Exhibit A" attached to this affidavit is a copy of a contract signed by First National Pictures, Inc. by its then Vice President and attested by me as its Secretary; that "Exhibit B", being a letter dated December 11, 1928, is a copy of a letter which was written to and received by me from R. L. Giffen, who is one and

the same person as the individual who signed said letter as "Larry", and that the note, "Exhibit C", is a note which accompanied said letter; that "Exhibit D" is a copy of a letter which was written and mailed by me to Larry Giffen, being one and the same person as R. L. Giffen. That the said R. L. Giffen is one and the same person as the R. L. Giffen named in paragraph 13 of the annexed contract, "Exhibit A". [12]

I further say that the aforesaid contract, "Exhibit A", was, some time subsequent to its date and prior to the institution of the action herein, assigned by First National Pictures, Inc. to Warner Bros. Pictures, Inc. and that all the rights granted in said contract to First National Pictures, Inc. are now vested in said Warner Bros. Pictures, Inc.

R. W. PERKINS

Subscribed and sworn to before me this 30th day of November, 1938.

[Notarial Seal]

LILLIAN R. GEFFERT

Notary Public, Queens County

Queens Co. Clerk's No. 690, Reg. No. 1163

New York Co. Clk's No. 230, Reg. No. O-G-153

My Commission Expires March 30, 1940. [13]

[For Exhibit A attached hereto see page 12 of this printed record.]

EXHIBIT B

Alice Kauser

R. L. Giffen

Alice Kauser Motion Picture Department

1402 Broadway, New York

Cable Address: Linadore, New York

December 11, 1928.

Mr. R. W. Perkins,
First National Pictures, Inc.,
383 Madison Avenue,
New York City.

Dear Bob:—

It was my understanding that the phraseology in the contract for "Sh! The Octopus", covered, as it was certainly intended to do, the so-called talking, as well as the motion picture rights.

The negotiations for the purchase were conducted upon the basis of both the picture and the talking rights, and I am sure that no one connected with the sale would think of contending otherwise.

Sincerely,

LARRY [22]

EXHIBIT C

Dear Bob:

If this is not the coverage you require, let me know and I'll change, abridge or amplify it in any way you suggest. [23]

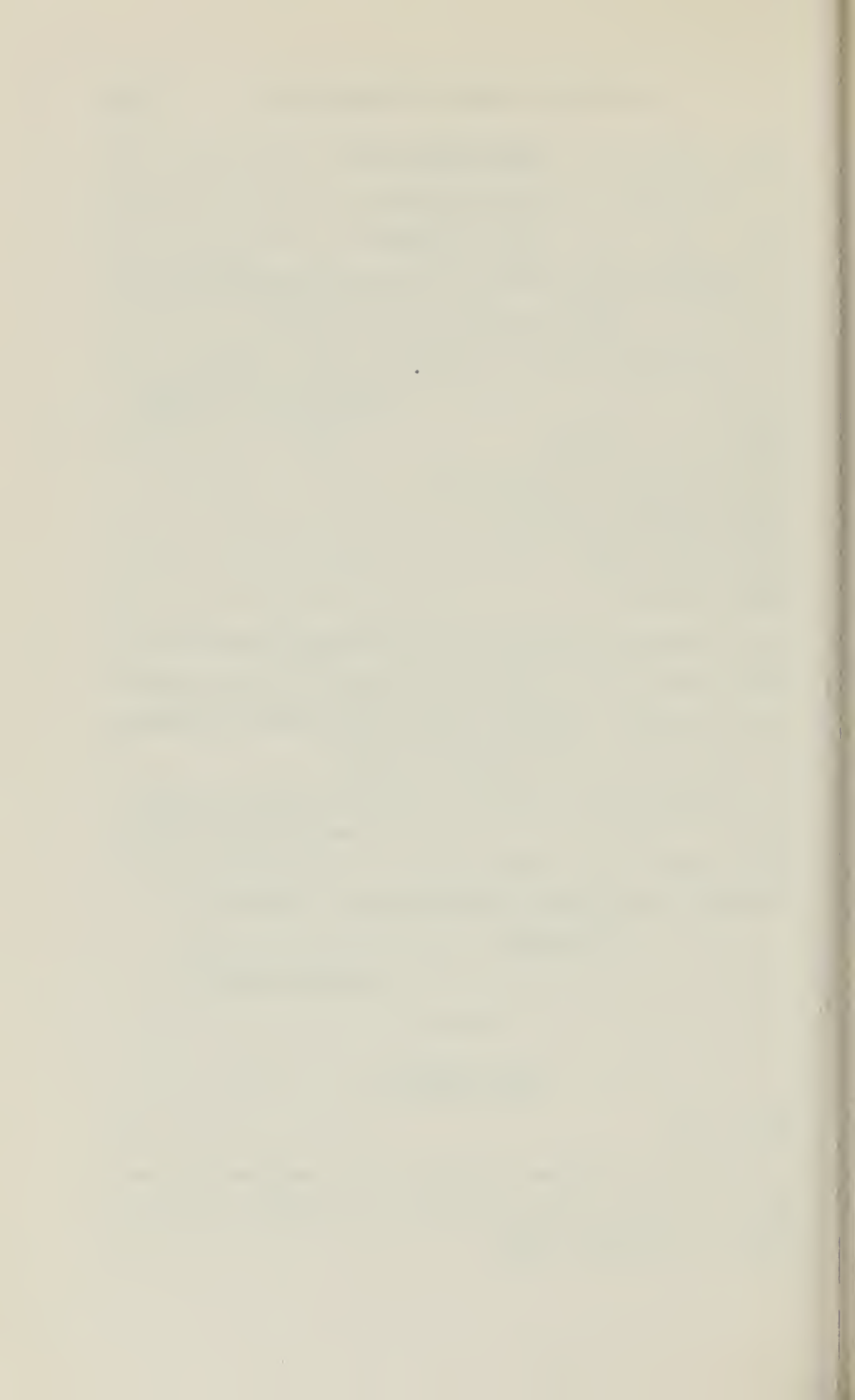


EXHIBIT D

December 13, 1928.

Mr. Larry Giffen,
1402 Broadway,
New York City.

Dear Larry:

Thank you for your letter of December 11th, 1928, which confirms the language of the contract, which I already think is entirely clear, that the talking motion picture rights, as well as the ordinary motion picture rights, are covered in our contract for "Sh, The Octopus".

With best wishes, I am

Sincerely yours,

R. W. PERKINS

[Duly verified.]

[Endorsed]: Filed Jan. 6, 1939. [24]

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT.

State of California,
County of Los Angeles—ss.

Ralph Murphy and Donald Gallaher having been duly sworn depose and say:

That they are the plaintiffs in the above entitled action and that they have read the motion for Sum-

mary Judgment dated January 6, 1939 together with the affidavit of R. W. Perkins verified November 30, 1938 together with Exhibits "B", "C", and "D" attached thereto. That Mr. R. L. Giffen was not connected with the plaintiffs or either of them and was not authorized to act as an agent or otherwise on behalf of the plaintiffs or either of them on the 11th day of December, 1928 or at any time subsequent to the 30th day of April, 1928. That neither of affiants were notified or informed or had any knowledge of the documents attached to said motion for Summary Judgment and to said affidavits respectively designated Exhibits "B", "C" and "D" and each and all of the statements made in Exhibit "B" with respect to negotiations for the purchase of the motion picture rights of "Sh—The Octopus" and with respect to the intention of the contracting parties are wholly untrue.

Neither of your affiants was ever asked to convey nor quoted a price for the purchase of dialogue or talking motion picture rights [25] and at no time were affiants or either of them asked to convey nor did they intend to convey the dialogue or talking motion picture rights nor the right to record spoken words and dialogue in synchronism or timed relation to the photographing of any motion picture version of said play entitled "Sh—The Octopus" nor the right to reproduce and make audible the spoken words and dialogue of said play in synchronism or timed relation with the projection of the motion picture photoplay upon the screen, nor to

convey the right to dramatize or reproduce the spoken words and dialogue by mechanical or electrical means or otherwise, although each and all of said rights were well known to each of the contracting parties on the 30th day of April, 1928, and all of such rights were reserved by the plaintiffs as is more particularly set forth in the second cause of action alleged in their amended and supplemental complaint on file herein.

That said agreement dated April 30, 1928 marked Exhibit "A" and attached to defendants' motion for Summary Judgment was prepared by the grantee First National Pictures Inc. and its attorneys, which grantee and co-defendant is the assignor and predecessor in interest of the moving defendant Warner Bros. Pictures, Inc. and said agreement was at no time submitted to plaintiffs' attorneys for their approval thereon.

Affiants hereby adopt and by this reference incorporate herein each and every allegation contained in their amended and supplemental complaint on file herein and in addition thereto aver that under the laws and judicial decisions of the State of New York at the time said agreement was made and entered into by affiants, only such rights were granted as were expressly set forth in said agreement, which rights did not include either dialogue or talking motion picture rights nor the right to record spoken words and dialogue of the play "Sh—The Octopus" in synchronism or timed relation with the photographing of motion picture versions of said play,

nor the right to reproduce the spoken words and dialogue by mechanical or other means, or make [26] audible the spoken words and dialogue of said play in synchronism or timed relation with the projection of any motion picture version upon the screen, nor the right to publicly perform or reproduce dramatizations of said play by and with the use of spoken words and dialogue therefrom, nor the right to reproduce or dramatize the spoken words and dialogue by mechanical or electrical or other means, and affiants did not intend to nor did they grant said rights or any of them to the defendant First National Pictures Inc. in and by said agreement dated April 30, 1928 or otherwise, and neither of the parties to said agreement intended at the date of its execution that said dialogue and talking motion picture rights or any of the other rights more particularly hereinabove described and enumerated should be or were included in the grant, assignment transfer and sale more particularly set forth in said agreement dated April 30, 1928.

Wherefore affiants pray that defendants motion for Summary Judgment be denied.

RALPH MURPHY

DONALD GALLAHER

Subscribed and sworn to before me this 10th day of January, 1939.

[Notarial Seal] THOMAS B. SAWYER

Notary Public in and for said County and State.

[Endorsed]: Filed Feb. 1, 1939. [27]

At a stated term, to wit: The February Term, A. D. 1939, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 20th day of February in the year of our Lord one thousand nine hundred and thirty-nine.

Present:

The Honorable Harry A. Hollzer, District Judge.

[Title of Cause.]

This cause coming on for hearing motion of Warner Bros. Pictures, Inc., for summary judgment, pursuant to Notice filed February 7, 1939; Roger Marchetti and Harold A. Fendler, Esqs., appearing for the plaintiffs; Herbert Freston and John P. McGinley, Esqs, appearing for the defendants:

Attorney Fendler files supplementary affidavits of the plaintiffs, and counsel stipulate that supplementary affidavits of the plaintiff, Donald Gallaher, may be signed and sworn to later.

Attorney McGinley makes a statement. Attorney Fendler argues in opposition to the said motion, and Attorney McGinley argues in support of the said motion. Thereupon, counsel stipulate that the said motion may be withdrawn. Attorney McGinley moves to withdraw the said motion, and it is ordered that the motion be, and it is, withdrawn without

prejudice to renewing the same upon such affidavits as heretofore filed, which either party may wish to use.

It is ordered that Warner Bros. Pictures, Inc., be allowed 30 days in which to file answer.

4/29 [29]

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF PLAINTIFF DONALD GALLAHER IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

State of California,
County of Los Angeles—ss.

Donald Gallaher, having been duly sworn deposes and says:

I, Donald Gallaher, started my career in the theatre as an actor in the year 1899 since which time I have been employed as an actor in ninety-eight Broadway productions of plays for such producers as Charles Frohman, C. B. Dillingham, Abe Erlanger, Marc Klaw, Winthrop Ames, Liebler and Co., George C. Tyler, A. H. Hood, Sam Harris, George M. Cohan, Sam and Lee Shubert, Arthur Hopkins, David Belasco, and many others.

In 1903 I appeared in the first silent motion picture to be filmed that was based on a "plot" or story. Thereafter all through the life of silent pic-

tures (from 1903 to 1928) I appeared as an actor in over two hundred "Feature" pictures for such firms as Biograph, Vitagraph, Tannhauser, Essenay, Selig, Lubin, Triangle, World Films, Loew-Metro Fox, Harry Rapf, Gallaher-Lund Productions, etc.

In the year 1916 I was employed by Messrs. Sam and Lee Shubert to direct ten plays. Thereafter, between the years of 1916 and 1924 I was employed by various producers as director of twenty-six plays. Between the years of 1924 and 1928 I was Producer, Co-Producer, Director and/or Co-author of twenty-one plays including [30] "Is Zat So", "White Magic", "In This Room", "Fool's Bells", "The Gorilla", "Golden Age", "Lovers Leap", "Sh! The Octopus", etc. Also between the years of 1918 and 1922 I was half owner of the silent motion picture producing firm of Gallaher and Lund and produced, directed and was author, or co-author of twelve feature pictures.

In the latter part of 1924 and early part of 1925 I was engaged in experimental work with Dr. Lee DeForrest on his "Phonofilm" laboratories. During this period I directed many experimental films in sound, music and dialogue photography: Including President Coolidge speaking from the steps of the White House, Eddie Cantor, The Cheauve Souris, etc.

Since 1928 I have been employed continuously, (with the exception of intermittant period when I returned to New York to direct or act in various

plays), in Hollywood as Director, Dialogue Director, Continuity Writer, Dialogue Writer and/or actor of talking motion pictures including "The Ghost Talks", "The Diplomats", "Joy Street", "Friendship", "Through Different Eyes", "Pleasure Crazy", "Nix on Dames", "Temple Tower", "June First", "The Hot Spot", "Legion of the Lost", "My Old Kentucky Home", "Collegiate", "Magnificent Brute", "Flying Hostess", "Breezing Home", "Let Them Live", "Religious Racketeer", "Code of the Fearless", "Never Say Die", etc.

In as much as I have been constantly employed for thirty-nine of my forty-three years of life in all branches of the theatrical profession, silent motion picture productions ("Movies") and talking motion picture productions ("Talkies"), I can safely say that I am, and have been for most of my life, personally familiar with the terms, phrases, words and expressions used in the theatrical, silent picture and talking picture industries.

Also, inasmuch as I have, in those same thirty-nine years, carefully read, discussed and signed, in excess of five hundred different personal contracts, of which I had personally drawn up [31] at least half that number, I can safely state that I am, and always have been, familiar with the terms, words, phrases and expressions employed in theatrical, silent picture and talking picture, contracts.

Further, inasmuch as I have for the past twenty-three years been familiar with the problems of the

theatrical, silent picture and talking picture industries I have frequently been called upon to act as arbitrator in numerous contractual disputes.

Also, since I was known to be personally familiar with the problems of employer and employee, and buyer and seller of literary and dramatic works for both theatrical and motion picture production, I was frequently asked to serve on committees formulated for the purpose of discussing and drawing up new standard forms of contracts to be used in the theatrical and motion picture industries.

This is most particularly true of the period immediately prior to and including the month of April, 1928, during which time I was a member of the Author's League of the Dramatist's Guild of America, both as an author and as a producing manager and in consequence frequently served in an advisory capacity in the discussion and drawing up of new standard contracts for that organization.

I have read Mr. Ralph Murphy's supplemental Affidavit verified February 17, 1939 in opposition to defendant's motion for summary judgment and wish to state that of my own personal knowledge it is accurate and true and if called to the witness stand in this case I can and will testify from my personal knowledge to each and all of the things and matters set forth therein from line 27 page 2 to line 8 page 6 inclusive.

The expressions quoted in said affidavit and the definitions and classifications of rights appearing

on pages 3 and 4 of his affidavit, are particularly accurate and true and were well-established by usage and well-known throughout the theatrical and motion picture industries. [32]

I also wish to state that before signing the contract dated April 30, 1928, between First National Pictures, and M. & G. Amusements, Ralph Murphy and Donald Gallager for the purchase of motion picture rights in the play "Sh! The Octopus", I submitted said contract for consideration to the Author's League of the Dramatists Guild of America which confirmed my own personal knowledge, opinion and intention that the rights being purchased by First National Pictures did NOT include the right to record or photograph or reproduce in spoken, audible words any of the dialogue then incorporated in the manuscript of the play "Sh! The Octopus", or any other or different dialogue that might subsequently be written by any other author, or authors, without a supplemental agreement in writing from Ralph Murphy, Donald Gallaher and M. & G. Amusements, Inc., I then signed the contract.

In this connection I wish to point out the positively significant fact that \$10,000 was an inadequate and excessively small purchase price even for silent "moving picture rights to a play produced successfully in New York City and was a price considerably lower than the amounts received by me from the sale of moving picture rights (exclud-

ing dialogue and talking rights) of other equally successful plays.

The primary considerations for the sale at such a low price were #1 the fact that NO DIALOGUE rights were included in the contract; and #2 the fact that, since the advent of the "talkies", the period of time in which First National Pictures Inc., might produce the play as a "silent" picture or with mere sound effects, was possibly limited to six or eight months.

DONALD GALLAHER

Subscribed and sworn to before me this 20th day of February, 1939.

[Seal] GILDA M. PAONESSA,
Notary Public in and for said County and State.

[Endorsed]: Filed Feb. 28, 1939. [33]

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF PLAINTIFF RALPH MURPHY IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

State of California,
County of Los Angeles—ss.

Ralph Murphy, having been duly sworn deposes and says:

That he is one of the plaintiffs in the above entitled action and is now and for twenty-three years

last past has been engaged in the theatrical, musical and entertainment and motion picture industries. That from 1916 until 1922 affiant was employed as an actor in connection with legitimate stage productions in New York City and elsewhere throughout the United States.

That between the years 1922 and 1929 affiant was engaged in the occupation of writer, stage director and producer of a large number of plays produced upon the legitimate stage in New York City and elsewhere throughout the United States. Plays written, produced and directed by affiant during said period of time included "Surefire", "Flossie", "The Handy Man", "The Black Tower", "Cortez", and "Sh— The Octopus". Affiant during this same period directed plays which were produced by Henry Miller, John Golden, Earl Carroll, Al Woods, and the American Play Company, and other well known New York stage producers, starring such well known legitimate stage and moving picture actors and actresses as Emily Stevens, Edward Arnold, Ernest Glendinning, Florence Eldredge, Tim Murphy and a large number of others. [35]

That commencing approximately during the year 1929 and continuing to and until the present time affiant was employed in the production of motion pictures as a writer and director, and during said period of time affiant wrote and collaborated in the writing of the following motion picture photoplays: "Millie", "The Big Shot", "Seventy Thou-

sand Witnesses", "Song of the Eagle", "Night Club Scandal", "Sweepstakes", "The Registered Woman", and "Women Go On Forever", which motion picture photoplays were distributed through such organizations as Pathe, Paramount, and Universal picture corporations.

That during the past ten years affiant has been employed as a director of numerous motion picture photoplays including some of the foregoing and in addition "Strictly Personal", "Golden Harvest", "Girl Without a Room", "Collegiate", "Men Without Names", "The Menace", "McFadden's Flats", "The Notorious Sophie Lang", and numerous others, all of which were produced and distributed by major producing and distributing corporations.

That during the entire period of twenty-three years hereinbefore mentioned affiant has been personally familiar with the words, terms and expressions used in the theatrical industry and in the entertainment world. That particularly since the year 1922 affiant has personally known and associated with the leading personalities in the theatrical world and has personally used the terms, expressions, and phrases which are peculiar to the theatrical industry.

That affiant knows of his own personal knowledge and can so testify if called as a witness in the above entitled case that during the month of April, 1928 in the City of and County of and State of New York and elsewhere throughout the United States

wherever stage plays were being produced and motion picture rights were being purchased and sold, there was a well-defined and well-settled usage and custom to distinguish and differentiate between [36] the various literary dramatic and motion picture rights which during the year 1928 and particularly during the month of April, 1928 were then in the City of New York and elsewhere throughout the United States, the subject of barter, purchase and sale and said rights were by well settled usage and custom to the personal knowledge of affiant, then distinguished, differentiated and classified by motion picture and stage producers alike and by all others engaged in the theatrical industry as follows, to-wit:

1. "Exclusive, complete and entire motion picture rights" by well settled usage and custom at said time and place referred solely to the right to use literary or dramatic compositions in the production of a silent motion picture photoplay.

2. "Sound rights" or "the exclusive right to use in conjunction with motion picture photoplays such devices for the recording and/or reproduction of sounds as may from time to time be utilized as a part of the presentation and exhibition of the photoplays, together with the right to utilize any music or orchestration in connection therewith", was by well settled usage and custom at said time and place throughout the moving picture and theatrical industry to affiant's personal knowledge, referred solely

to the right to utilize sound effects and music in connection with the production of motion picture photoplays excluding however, and never including, the right to use speech and dialogue in connection therewith.

3. "Dialogue" rights and "talking rights" by well settled usage and custom to affiant's personal knowledge, throughout the theatrical industry, referred to the right to use speech and dialogue in order to produce what was then and is at the present time known as a "talking motion picture photoplay".

That each of the foregoing expressions herein before quoted in subdivisions 1, 2 and 3 above during April of the year 1928 to affiant's personal knowledge, were particular terms and expressions [37] which by well-established and well-known usage throughout the theatrical industry had then acquired each of the meanings hereinbefore ascribed and set forth and were uniformly used in contracts throughout the motion picture industry and throughout the theatrical profession in the particular and peculiar sense and with the particular and peculiar meaning and definition hereinabove set forth and described.

That to affiant's personal knowledge the terms and expressions numbered 1 and 2 hereinabove referred to and set forth which were used and which appear in the contract dated April 30, 1928 more particularly referred to in the second cause of action

of plaintiffs' complaint and which are attached to defendant's moving papers, were used in the peculiar sense and with the particular meaning hereinabove set forth, which said phrases and expressions had theretofore acquired and were universally accepted by usage throughout the theatrical industry.

That the usage and peculiar sense and meaning hereinabove described were each and all well known to the parties to said agreement, and were used by said parties to affiant's personal knowledge in said contract with the peculiar meaning and in the particular sense hereinabove described and set forth.

At the time this contract was executed in April, 1928 talking pictures were not a form of entertainment regularly used and exhibited in motion picture theatres. The so-called "Silent" pictures were predominant and a few pictures used special sound effects. The public generally and many motion picture producers as well as all stage producers were very much opposed to talking motion pictures. In fact, a popular phrase of the day was "the talkies will never last", and freely predicted their total failure. The right to make silent motion picture photoplays was still being purchased and sold under the old existing contract which had been in use for many years prior [38] to 1928. Very few actors in silent motion picture photoplays had ever spoken a line on the stage nor were they capable of speaking lines or dialogue in what is presently known as a talking motion picture. Controversies were waged

in the trade journals giving as a concensus of opinion that talking pictures would never work and announcements were made of pictures with sound effects, or "sound pictures". During the month of April, 1928, and for a considerable period of time thereafter trade journals and trade newspapers throughout the theatrical and motion picture industry distinguished and differentiated between silent motion picture photoplays, sound pictures and "talkies". Motion pictures were advertised in trade journals and in newspapers of general circulation by producers and distributors as pictures with sound effects, and motion pictures running at the time had interpolated songs and music "dubbed in" to the silent photoplays.

Affiant knows of his own personal knowledge that First National Pictures, Inc., purchased the motion picture rights of "Sh! The Octopus" for the purpose of making a motion picture photoplay with sound effects which would be a "follow-up" or "sequel" to the prior mystery photoplay entitled "The Gorilla" which had been written at least in part by affiant's co-plaintiff Donald Gallaher and the silent picture rights of which were purchased for a sum in excess of the \$10,000 paid by First National Pictures, Inc. for the motion picture rights of "Sh! The Octopus".

Affiant can testify from his personal knowledge that First National Pictures Inc. intended to and through their agents suggested to affiant that it in-

tended to produce "Sh! The Octopus" as a silent motion picture photoplay with sound effects added immediately after the agreement dated April 30, 1928 was executed, but for reasons unknown to affiant First National Pictures Inc. did not at any time produce said motion picture photoplay. [39]

Affiant is informed and believes and thereupon alleges that the reason that First National Pictures Inc. did not produce "Sh— The Octopus" was because of the fact that within a short time after April, 1928 talking motion pictures became acceptable to the general public and to the theatrical and moving picture industry generally and First National Pictures Inc. had not acquired and did not own the dialogue rights or talking picture rights to said motion picture photoplay.

RALPH MURPHY

Subscribed and sworn to before me this 17th day of February, 1939.

[Seal]

FLORENCE B. MORRELL

Notary Public in and for said
County and State.

[Endorsed]: Filed Feb. 28, 1939. [40]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, WARNER BROS.
PICTURES, INC.

Comes now the defendant, Warner Bros. Pictures, Inc., one of the defendants in the above entitled

cause, by John P. McGinley of Freston & Files, its solicitors, and for answer to the Amended Complaint of the plaintiffs herein, respectfully states and shows unto the Court:

I.

Answering paragraph I, this defendant admits that Warner Bros. Pictures, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and authorized and qualified to do business in the City and County of Los Angeles, State of California.

Denies the remaining allegations of said paragraph I. [42]

II.

Answering paragraph II, denies each, all and every of the allegations therein contained.

III.

Answering the allegations of paragraph III, this defendant is without knowledge or information sufficient to form a belief as to the truth of said allegations and basing its denial upon that ground, denies each, all and every of the allegations of paragraph III.

IV.

Answering paragraph IV, this defendant admits the allegations of said paragraph and in addition thereto alleges that there are other and different grounds upon which the jurisdiction of this Court has been invoked, all as more particularly appears

from this defendant's Petition for Removal of Cause to the District Court of the United States, for the Southern District of California, Central Division, from the Superior Court of the State of California, in and for the County of Los Angeles, reference to said petition being made for a more particular description of said grounds.

V.

Answering paragraph V, this defendant is without knowledge or information sufficient to form a belief as to the truth of said allegations and basing its denial upon that ground denies each, all and every of the allegations therein contained.

VI.

Answering the allegations of paragraph VI, this defendant denies that ever since the 9th day of December, 1927, plain- [43] tiffs have been the sole and/or exclusive owners and/or proprietors of all rights, titles and interests in and to the copyright described therein and particularly in and to all dramatic rights, radio and television rights, talking rights and the dialogue rights therein and thereto and in this connection alleges the fact to be that on the 30th day of April, 1928, by written contract, a copy of which is attached to plaintiffs' Amended Complaint marked "Exhibit A", said plaintiffs sold, conveyed and granted to defendant, among other things, the right to make talking mo-

tion picture versions of the literary material, the subject of said contract, and any version or dramatization thereof, and to record spoken words and dialogue in synchronism or timed relation with the photographing of any such motion picture version, and the right to reproduce and make audible the said spoken words and dialogue in synchronism or timed relation with the projection on screens and to publicly perform and reproduce motion picture versions and dramatizations of said literary material by means of motion picture and spoken words and dialogue recorded and reproduced in synchronism or timed relation therewith by mechanical or electrical means.

Further answering the remaining allegations of said paragraph VI, this defendant is without knowledge or information sufficient to form a belief as to the truth of the same and basing its denial upon that ground denies the same.

VII.

Answering the allegations of paragraph VII, this defendant denies each, all and every of the allegations therein contained.

VIII.

Answering the allegations of paragraph VIII, this defendant denies that it has infringed upon plaintiffs' copyright or [44] that it is now continuing to infringe upon plaintiffs' alleged literary

property. At the time of the preparation of this Answer, counsel for defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiffs have notified defendant of the claimed infringement of their alleged literary material and basing denial upon that ground, defendant denies the same; however, in this connection, this defendant, prior to the trial of the above entitled cause, will cause an examination to be made of the files and records as related to the matter in controversy and if such investigation discloses that any demands or notifications, as alleged in paragraph VIII, have been made upon this answering defendant, such fact will be set forth in an amendment to this Answer.

Answer to Second Cause of Action

I.

Answering paragraph I, this defendant repleads, restates and re-incorporates by reference its answers to paragraphs I, II and III of plaintiffs' first cause of action with the same force and effect as though said answers were set forth in full.

II.

Answering paragraph II, this defendant denies that at all times in said Amended Complaint mentioned, or at the present time, plaintiffs, retain each and all of the literary and/or dramatic rights and/or all other rights therein and thereto solely excepting certain motion picture rights more particularly re-

ferred to in paragraph IV of plaintiffs' Amended Complaint, and in this connection alleges the fact to be that on the 30th day of April, 1928, [45] by written contract, a copy of which is attached to plaintiffs' Amended Complaint marked "Exhibit A", said plaintiffs sold, conveyed and granted to defendant, among other things, the right to make talking motion picture versions of the literary material, the subject of said contract, and any version or dramatization thereof, and to record spoken words and dialogue in synchronism or timed relation with the photographing of any such motion picture version, and the right to reproduce and make audible the said spoken words and dialogue in synchronism or timed relation with the projection on screens and to publicly perform and reproduce motion picture versions and dramatizations of said literary material by means of motion picture and spoken words and dialogue recorded and reproduced in synchronism or timed relation therewith by mechanical or electrical means.

Further answering the remaining allegations of said paragraph II, this defendant is without knowledge or information sufficient to form a belief as to the truth of the same and basing its denial upon that ground, denies the same.

III.

Answering paragraph III, this defendant is without knowledge or information sufficient to form a

belief as to the truth of said allegations and basing its denial upon that ground, denies the same.

IV.

Answering paragraph IV, admit that on or about the 30th day of April, 1928, in the City and County of New York, State of New York, plaintiffs and the M. & G. Amusements, Inc. entered into a written agreement with First National Pictures, Inc., a copy of which agreement is attached to plaintiffs' Amended Complaint, [46] marked "Exhibit A"; admit that paragraph 10 of said written agreement just referred to was in words and figures as follows, to-wit:

"Each and every term of this agreement shall be construed in accordance with the laws of the United States of America and of the State of New York."

Further answering paragraph IV, this defendant denies each, all and every of the allegations therein contained not herein expressly admitted, qualified or denied.

V.

Answering paragraph V, this defendant admits the allegations therein set forth.

VI.

Answering paragraph VI, this defendant admits that during the year 1937 it produced a talking motion picture photoplay entitled "Sh! The Oc-

topus'', and that following its production said photoplay was distributed and exhibited generally in the State of California and elsewhere throughout the world.

Admits that said talking motion picture photoplay was based, as defendant is informed and believes and therefore alleges, upon the literary material acquired by defendant from plaintiffs under the terms and provisions of the contract dated April 30, 1928, "Exhibit A" attached to plaintiffs' Amended Complaint.

Further answering the allegations of paragraph VI, this defendant denies each and all of the remaining allegations of said paragraph not herein specifically admitted, qualified or denied.

VII.

Answering the allegations of paragraph VII, counsel for defendant, at the time of the preparation of this Answer, is [47] without knowledge or information sufficient to form a belief as to the truth of the allegations that defendant has at all times been notified and advised by the plaintiffs that it would be held responsible for all damages and/or profits resulting from the alleged unauthorized use of plaintiffs' property and alleged literary rights, and basing denial upon that ground, defendant denies the same; however, in this connection, this defendant, prior to the trial of the above entitled cause, will cause an examination to be made

of the files and records as related to the matter in controversy and if such investigation discloses that any demands and notifications, as alleged in paragraph VII, have been made upon this answering defendant, such fact will be set forth in an amendment to this Answer.

Further answering paragraph VII, this defendant denies all of the remaining allegations.

VIII.

Answering paragraph VIII, this defendant denies each, all and every of the allegations therein contained.

IX.

Answering paragraph IX, this defendant denies all of the allegations therein contained and with respect to the value of the talking rights to the motion picture entitled "Sh! The Octopus", alleges the facts to be as follows:

(a) That on or about the 30th day of April, 1928, and in consideration of the payment of Ten Thousand (\$10,000.00) Dollars, First National Pictures, Inc. acquired from the plaintiffs the silent and talking motion picture rights, all as more particularly set forth in "Exhibit A" attached to plaintiffs' Amended Complaint. [48]

(b) That First National Pictures, Inc. thereafter and prior to the filing of plaintiffs' Amended Complaint transferred to Warner Bros. Pictures, Inc. all of its right, title and interest in and to said

contract, "Exhibit A", attached to plaintiffs' Amended Complaint; and pursuant thereto and by reason of the rights held by it, this defendant produced a motion picture play entitled "Sh! The Octopus" in which the cost to it of the sound used in connection with the motion picture play far exceeded the sum of Three Thousand (\$3,000.00) Dollars, exclusive of any interest or any court costs.

(c) That said motion picture photoplay entitled "Sh! The Octopus" cost this defendant in excess of One Hundred Fifty Thousand (\$150,000.00) Dollars to produce; that the value to this defendant of the right to use sound in connection with the motion picture play entitled "Sh! The Octopus" far exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and any court costs.

(d) That the value of the motion picture play entitled "Sh! The Octopus", produced by this defendant, lies not merely in the cost to it of producing the same, but in distributing the same and the profit to be derived therefrom.

For a first, further, separate and distinct defense this defendant alleges as follows:

I.

That plaintiffs' Amended Complaint does not state facts sufficient to constitute a cause of action against this answering defendant. [49]

For a second, further, separate and distinct defense this defendant alleges as follows:

I.

That on or about the 30th day of April, 1928, plaintiffs entered into a written contract with this defendant's predecessor in interest, First National Pictures, Inc.; that a copy of said agreement is attached to plaintiffs' Amended Complaint, marked "Exhibit A", here referred to and by this reference made a part hereof as though set forth in full.

II.

That for and in consideration of the sum of Ten Thousand (\$10,000.00) Dollars plaintiffs herein sold, transferred and granted to this defendant, among other things, the talking motion picture rights in and to that certain literary material entitled "Sh! The Octopus" written by plaintiffs. That said agreement in granting said rights to defendant, specifically provides as follows, to-wit:

"1. The Owner hereby agrees to, and by these presents does grant, bargain, sell, assign, transfer and set over (all hereinafter termed 'grant') to the Purchaser, the following rights in such writings:

"(a) the exclusive, complete and entire motion picture rights, including common law and statutory copyright in the same, throughout the world, together with all the benefits of the copyright in such writings, the title and the theme thereof, and of all remedies held thereunder, with respect to such motion picture rights; [50]

“(b) the exclusive right to make motion picture versions thereof and to produce and reproduce one or more motion picture photoplays, including negatives and positive prints made therefrom (all hereinafter termed ‘photoplays’), and to adapt, arrange, change, transpose, add to, and subtract from the said writings and the title and theme thereof to such extent as the Purchaser may deem expedient and the exclusive right to use, in conjunction with said motion picture versions such devices for the recording and/or reproduction of sounds as may from time to time be utilized as a part of the presentation and exhibition of the photoplays, together with the right to utilize any music or orchestration, score or numbers in connection with said pictures as may be desired. Nothing herein contained shall be deemed to grant the right to utilize any device for the recording or reproduction of sounds by radio or other means than such as are utilized as a part of the entertainment connected with the projection of the pictures upon the screen, simultaneously therewith;

“(c) the exclusive right to distribute, exhibit and otherwise exploit and dispose throughout the world of such motion picture versions;

“(d) the exclusive right to secure copyright registration and title to such photoplays in all countries of the world in its own name or otherwise;

“(e) the right to use lines or excerpts from said writings for the title and/or subtitles, and/or [51] text of said motion pictures;

“(f) the exclusive rights, for the purpose of advertising and exploiting such motion pictures, to publish and to use excerpt, summaries and novelizations (not to exceed 3,000 words in length) from such writings in heralds, booklets, programs, posters, lobby displays, press books, newspapers, magazines and other periodicals (as serials or otherwise) and in all other mediums of advertising and publicity whatsoever (but solely for advertising and not for commercial uses).”

That by reason of the foregoing, in point of law, arising upon the face of the Amended Complaint herein, defendant alleges that the facts alleged in said Amended Complaint are insufficient to constitute a valid cause of action against this defendant.

For a third, further, separate and distinct defense this defendant alleges as follows:

I.

As an alternative statement of defense, this defendant alleges that even though the terms and provisions of sub-paragraphs (b), (c), (d), (e) and (f) of said contract, “Exhibit A” attached to said Amended Complaint, be entirely disregarded, never-

theless under sub-paragraph (a) of paragraph 1 of plaintiffs' "Exhibit A" this defendant acquired the talking motion picture rights to the literary property entitled "Sh! The Octopus" by reason of the following facts, to-wit:

That one of the terms and conditions of the written agreement executed by and between the plaintiffs and this defendant's [52] predecessor in interest on the 30th day of April, 1928, a copy of which is attached to plaintiffs' Amended Complaint marked "Exhibit A", was that each and every term of said agreement should be construed in accordance with the laws of the United States of America and of the State of New York. That in this respect defendant alleges that subsequent to the execution of said contract it has been judicially determined by the laws of the State of New York that the term "exclusive motion picture rights", as used in paragraph 1, sub-division (a), embraced not only silent motion picture rights, but talking motion picture rights as well.

For a fourth, further, separate and distinct defense this defendant alleges as follows:

I.

That on or about the 30th day of April, 1928, plaintiffs entered into a written agreement with defendant's predecessor in interest wherein and whereby plaintiffs granted to defendant, among other things, the talking motion picture rights to that cer-

tain literary material entitled "Sh! The Octopus"; that a copy of said agreement is attached to plaintiffs' Amended Complaint, marked "Exhibit A", and is hereby referred to and made a part hereof as though set forth in full.

II.

That in the negotiations for the sale of plaintiffs' literary property, plaintiffs were represented by their duly authorized agent, R. L. Giffen, sometimes known as Larry Giffen; by express provision in said contract of sale, R. L. Giffen was designated and confirmed as the agent of the plaintiffs in the following manner: [53]

"The owner hereby recognizes R. L. Giffen as its agent who has negotiated the sale terminating in this agreement."

III.

That throughout the negotiations leading up to and concluding in the execution of said contract, "Exhibit A" hereinabove referred to, it was the intention of the contracting parties to grant to defendant the talking motion picture rights as well as the silent motion picture rights, among other things, for the sum of Ten Thousand (\$10,000.00) Dollars.

IV.

That shortly following the execution of said contract, "Exhibit A", and during the month of December, 1928, plaintiffs confirmed by letter that said

contract of sale granted to defendant the talking motion picture rights as well as the silent motion picture rights to the literary property entitled "Sh! The Octopus"; that attached hereto, here referred to and incorporated herein by reference and marked Exhibits A, B and C, is an interchange of letters between plaintiffs' duly authorized agent, R. L. Giffen, and defendant's predecessor in interest, First National Pictures, Inc.

V.

That in addition to the terms and provisions of said contract defendant has at all times relied upon the interpretation placed upon the terms of said contract as granting to it the talking motion picture rights as well as the ordinary motion picture rights. That in reliance upon plaintiffs' confirmation, as well as the terms and provisions of said contract, defendant has expended large sums of money in producing a talking motion picture photoplay based upon the literary material entitled "Sh! The Octopus"; that defendant [54] is informed and believes and therefore alleges that although "Exhibit A" was executed on or about the 30th day of April, 1928, plaintiffs did not assert or make any demand nor contend that said contract, "Exhibit A" attached to plaintiffs' Amended Complaint, did not grant to defendant the talking motion picture rights as well as the silent motion picture rights in and to the literary material entitled "Sh! The Octopus" until shortly before the filing of suit herein, which

was during the month of November, 1937, after a lapsed period of over eight (8) years.

That by reason of the facts herein alleged, plaintiffs are estopped from asserting that defendant did not acquire on April 30, 1928, by virtue of the terms and provisions of said contract "Exhibit A" attached to plaintiffs' Amended Complaint, the talking motion picture rights to the literary material entitled "Sh! The Octopus".

For a fifth, further, separate and distinct defense this defendant alleges as follows:

I.

Defendant incorporates by reference all of paragraphs I, II, III, IV and V of its Fourth, Further, Separate and Distinct Defense, and makes the same a part hereof as though fully set out herein.

II.

That plaintiffs, by their laches, are barred from maintaining this action.

For a sixth, further, separate and distinct defense this defendant alleges as follows:

I.

Defendant incorporates by reference all of paragraphs I, II, III, IV and V of its Fourth, Further, Separate and Distinct Defense, [55] and makes the same a part hereof as though fully set out herein.

II.

That plaintiffs have waived any right to claim or assert that defendants did not acquire the talking motion picture rights as well as the ordinary motion picture rights to the literary material "Sh! The Octopus" under and by virtue of the terms of the agreement "Exhibit A" attached to plaintiffs' Amended Complaint.

Wherefore, defendant, Warner Bros. Pictures, Inc., prays judgment that the plaintiffs' Amended Complaint be dismissed with costs to the defendant, and for such other, further and different relief as may be meet and agreeable to equity.

JOHN P. MCGINLEY

Solicitor for defendant,

Warner Bros. Pictures, Inc.

FRESTON & FILES,
650 South Spring Street,
Los Angeles, California,
Of Counsel. [56]

EXHIBIT A

Alice Kauser

R. L. Giffen

Alice Kauser Motion Picture Department

1402 Broadway, New York

Cable Address: Linadore, New York

December 11, 1928

Mr. R. W. Perkins,
First National Pictures, Inc.,
383 Madison Avenue,
New York City.

Dear Bob:

It was my understanding that the phraseology in the contract for "Sh! The Octopus", covered, as it was certainly intended to do, the so-called talking, as well as the motion picture rights.

The negotiations for the purchase were conducted upon the basis of both the picture and the talking rights, and I am sure that no one connected with the sale would think of contending otherwise.

Sincerely,

LARRY [57]

EXHIBIT B

Dear Bob:

If this is not the coverage you require, let me know and I'll change, abridge or amplify it in any way you suggest. [58]

EXHIBIT C

December 13, 1928

Mr. Larry Giffen,
1402 Broadway,
New York City.

Dear Larry:

Thank you for your letter of December 11th, 1928, which confirms the language of the contract, which I already think is entirely clear, that the talking motion picture rights, as well as the ordinary motion picture rights, are covered in our contract for "Sh! The Octopus".

With best wishes, I am

Sincerely yours,

R. W. PERKINS

[Endorsed]: Filed Mar. 20, 1939. [59]

[Title of District Court and Cause.]

NOTICE OF AND MOTION FOR SUMMARY
JUDGMENT

To Ralph Murphy, Donald Gallaher, and The M. & G. Amusements, Inc., a corporation, The Above Named Plaintiffs, and to Roger Marchetti and Harold A. Fendler, Their Counsel:

You and Each of You Will Please Take Notice that on the 26th day of June, 1939, at the hour of

196; that under and pursuant to paragraph 10 of Exhibit A, which is as follows:

“Each and every term of this agreement shall be construed in accordance with the laws of the United States of America and of the State of New York.”

such interpretation is binding upon the parties to this action.

Said motion will be based upon this notice of motion, upon plaintiffs' Amended Complaint, the affidavit of Nathan Levinson, the briefs and memoranda heretofore filed by this moving defendant in the above entitled cause, memorandum attached hereto, copy of which is served upon you herewith, and all of the files, records and proceedings in the above entitled cause. [63]

You Will Further Take Notice That in accordance with Rule 20 of the Rules of Procedure for the District Court of the United States, for the Southern District of California, we request that you furnish us, within five (5) days, answering memorandum or a statement that you will not oppose said motion.

Dated: June 12th, 1939.

JOHN P. McGINLEY,
Solicitor for defendant, Warner
Bros. Pictures, Inc.

FRESTON & FILES,
650 South Spring Street,
Los Angeles, California,
Of Counsel. [64]

[Title of District Court and Cause.]

AFFIDAVIT OF NATHAN LEVINSON

State of California,
County of Los Angeles—ss.

1. Nathan Levinson, on my oath depose and say:
That I am employed by Warner Bros. Pictures, Inc., and am in charge of the sound department of such Company, and am familiar from personal knowledge and experience with the development of the use of sound in the motion picture industry. Commencing with September, 1922, and for several years thereafter, I was employed by the Western Electric Company (Supply Department) as its Pacific District Radio Specialist, and was engaged in the sale, installation, and servicing of radio broadcast equipment, public address systems, power line carrier telephone systems, and other such products of the Bell Telephone Laboratories. In such capacity and in the performance of my duties I was in constant touch with the motion picture producing companies in Hollywood, California, and its environs, particularly in connection with the sale, installation, and servicing of public address systems and broadcasting equipment. Among other things, I became personally acquainted with Samuel L. Warner, now deceased, and assisted him [65] in the purchase and installation of a 500 watt radio broadcast transmitter. Such equipment was purchased on behalf of Warner Bros. Pictures, Inc., from Earle C. Anthony, Inc., and which equipment was used in

establishing the radio station now known as KFVB in Los Angeles.

During the latter part of the year 1924 or the early part of 1925, while in the employ of the Western Electric Company in the capacity of Pacific District Radio Specialist, I made one of my periodical visits to the Bell Telephone Laboratories in the City of New York. Such visit was made for the purpose of checking and becoming thoroughly acquainted with the latest developments of such laboratory in radio broadcasting equipment, radio receiving equipment, power line carrier telephone equipment, public address equipment, and other such products. On such visit, among other things, I was taken to a section of the laboratory where Mr. J. P. Maxfield demonstrated to me the Company's development of synchronized sound motion pictures. The demonstration was so adequate, and I was so much impressed thereby, that I called upon Samuel L. Warner and advised him I thought the Western Electric Company finally had the complete solution to the sound motion picture, as the synchronization and quality in the demonstration made to me were so striking that I felt and believed an organization with the facilities and technique of Warner Bros., working together with the engineers of the Bell Telephone Laboratories, could successfully produce, as a motion picture, such colorful productions as "Rose Marie", a light opera which at that time was a big hit on the New York legitimate stage.

Somewhat later I took Samuel L. Warner to the Bell Telephone Laboratories, where he was given a demonstration of the synchronized sound, motion pictures. The next day following such [66] demonstration I introduced Mr. Warner to Mr. Bert Hawkins, who at that time was my superior in my department of the Western Electric Company. At that time a Mr. Walter Rich had an option upon all necessary rights for the exploitation of the sound motion picture under the Western Electric patents. For this reason Mr. Bert Hawkins introduced Samuel L. Warner to Walter Rich, and an association was formed for the further development and exploitation of sound motion pictures for motion picture audience purposes, which association in 1926 was the basis for the formation of The Vitaphone Corporation. A license was granted by Western Electric Company for the production of sound motion pictures for motion picture audience purposes and experiments began in the fall of 1925 in the practical making of sound pictures at the Vitagraph Studios in Brooklyn. By the spring of 1926, at which time The Vitaphone Corporation had been formed, experimental talking pictures were being made regularly, but the Brooklyn studios proved inadequate for the work and a lease was taken upon the Manhattan Opera House on West 34th Street in New York City, and the Opera House was converted into a studio for the production of talking pictures. In order to make such conversion it was necessary to remove seats, provide acoustical treat-

ment throughout the entire interior of the auditorium, install the wiring and equipment for motion picture production lighting, and for the recording of sound. I was, at this time, and thereafter, kept advised of the experimentation and production, and became personally and directly associated with the project, and took part in the experimentation and production starting during the month of September, 1926.

Many technical difficulties at once presented themselves and every day was a day of pioneering. The synchronization of picture making and recording was something entirely new. Silent [67] pictures had been well developed, and in connection therewith the public had become used to having scenes photographed from different angles. Silent picture scenes shifted from long shots to closeups, and vice versa, and were taken from different angles to avoid monotony. This could not be done with then existing sound recording equipment. Shifting from scene to scene could be done with silent pictures because the art of cutting had been developed whereby a number of short takes could be combined consecutively in the finished product. Sound was recorded at this time upon discs, and though the cutting of disc records had been done experimentally and in a small measure, the existing art was not adaptable commercially or to practical motion picture production. The cutting of sound records is known in the industry as "dubbing". Records at that time could be made which would run continu-

ously for about fifteen minutes, but there was no practical method of recording without interruption from one record to another. When sound became involved, therefore, in order to have different camera shots or angles, it was necessary to have several cameras, some near and some distant or at different angles and focused on different spots. Each of these cameras, in order to secure an acceptable result in the sound record, had to be started together and run in synchronism with the recording disc. Thereafter, the different films from the different cameras could be spliced together to provide the necessary breaks in picturization but without losing synchronization.

Tremendous difficulty was encountered with noise, which, of course, had been immaterial in connection with the production of silent pictures. Noises appeared on the recording of all types. Little noises and big noises, electrical noises and mechanical noises, as well as those caused by radio disturbances [68] and earth shocks. The motion picture camera itself was one of the worst offenders, and, as well, the lighting equipment, usually consisting of arcs or Cooper-Hewitt mercury vapor tubes, was a source of both actual physical noise and electrically inducted noise. The Opera House in which the experimentation and production was proceeding was neither sound proof nor vibration proof, and the progress of trucks on adjoining streets, and particularly the construction work on the Eighth Avenue subway, would very often ruin recordings to

such an extent that it became necessary to do practically all of our recording in the Opera House at night. It was also necessary to build soundproof booths for the camera, since its whirring was plainly audible to such an extent that it would make recorded speech unintelligible. The early booths were of heavy and cumbersome construction, as originally they housed both cameras and recording machines. The mere soundproofing of the booth was a difficult problem, since soundproofing for this purpose was in itself an art without precedent. Likewise, microphones at the time had not been designed specifically for sound motion picture work and could not be easily moved because of their bulkiness and because of electrical noises developed when motion occurred. It became necessary to devise a new technique in order to use more than one microphone during production, such technique resulting in the development and use of the "monitoring" or "mixing" panel and the training of personnel known as "mixers" to operate the same in order that microphones could be cut in circuit or eliminated from the circuit, as required, to provide smooth recording prior to the development of the art of cutting or dubbing records. The result at this time was that the artist in general had to remain in a more or less fixed position with reference to the microphone or microphones during the entire time [69] of his or her performance. Such immobility was a serious handicap.

Projection of the completed product for audience consumption involved other and different problems.

Light or sight is practically instantaneous but sound travels at the relatively low speed of approximately 1100 feet per second. We found that if the picture or visual part of the production was synchronized precisely with the sound record then the apparent synchronization in the eyes of the audience would be perfect only up to a point about 75 feet from the screen. Within such distance the lips of the actor would apparently maintain perfect pace with the sound of the words as it reached the auditor, but back of such distance the sound would come to the auditor a little bit late, leaving the impression that there was something wrong with the picture. To compensate for this defect we discovered it was necessary to adjust the pictures and the records so as to be a trifle out of synchronization, in order that sound and the visual impression would both be received by the audience at the same time at a distance of from 90 to 120 feet from the screen. Problems of this sort were constantly being met and solved. Sound was recorded at the rate of 90 feet a minute. The visual action was recorded by a series of photographs of which 1440 were required in the same space of time. The sound record on each 1/1440th part of the 90-foot sound track had to correspond with precision to the individual exposure among the 1440 photographs taken per minute. The technical problems and the technical solutions could be expanded indefinitely, each problem and solution being an inseparable part of the final result.

After experimenting at the Opera House, it became apparent that a special type of studio, treated

acoustically and of soundproof construction, with special lighting facilities, was necessary for the successful production of sound motion pictures. [70] Accordingly, in the spring of 1927 Warner Bros. Pictures, Inc., built in Hollywood, under my supervision, the first specially constructed sound stage. Such stage had double walls with the space between filled with special insulating material. All equipment was moved from New York and under my supervision the process of preparation and installation was repeated in Hollywood. Production of sound motion pictures was commenced by Warner Bros. in Hollywood, under my supervision, in the month of March or April, 1927. Warner Bros. undertook the construction of an endless amount of special equipment in order to adapt recording of sound to the art of commercial motion picture production. The personnel had to be trained and the necessary men were obtained largely from among the engineers and technicians of the Bell Telephone System, since such men were in possession of the necessary primary education along the lines involved in the technique of sound recording. At one time in excess of three hundred trained technicians and engineers were attached to the recording department of Warner Bros.

Previous to actual usage of the special sound stages in Hollywood Warner Bros. produced and exhibited to the public a synchronized motion picture entitled, "Don Juan". This picture was released for exhibition in New York on August 6,

1926. The musical accompaniment thereto had been specially written in order that the playing time would coincide exactly with the playing time of the scene which the music was to accompany. Dr. William Axt and Mr. David Mendoza spent many hours watching and timing the photographic part of the picture in order to compose the musical theme, and then the Philharmonic Orchestra under Dr. Henry Hadley rehearsed the score countless times by stopwatch, in order that the playing of the score could be synchronized with the details of the picture. [71]

In addition to "Don Juan", short subjects were produced at the Opera House in New York City, and a few such short subjects, including an address by Will Hays and special renditions of the New York Philharmonic Orchestra and various operatic stars, were shown at the same time as, and subsequent to, the showing of "Don Juan". At that time, and following the release of "Don Juan", a few feature pictures were synchronized with music, and short subjects were made at the Opera House. Such short subjects consisted of operatic renditions of such famous artists as Martinelli, Gigli, Anna Case, Madame Schumann-Heink, and others. Such short subjects were all photographed and recorded with the action generally limited to one set, and each recording was one continuous performance running approximately ten to fifteen minutes.

After commencing production in Hollywood, Warners produced the first feature-length motion picture, which included dialogue and vocal rendi-

tions. Such picture was entitled, "The Jazz Singer", and presented Mr. Al Jolson. Such picture was first exhibited to the public in August, 1927. The first motion picture with all dialogue presented was Warner Bros.' "Lights of New York", which was first exhibited in July of 1928. By the fall of 1928, Warner Bros. Studio was confining its product exclusively to sound motion pictures.

Other producing companies followed Warner Bros. and different systems of recording, particularly the recording of sound on film as opposed to the recording of sound on disc records, were developed. In 1927 William Fox commenced production of the Movietone News Reel, which included sound recording on film.

In addition to my own personal experience in the development of motion picture sound recording, I have read and [72] examined two published books which I believe, from my own knowledge, report with a reasonable degree of accuracy, the development of sound recording in the motion picture industry. One book is entitled, "The Film Finds Its Tongue", and was written by Fitzhugh Green, copyrighted in the name of the author in 1929, and published by G. P. Putnam's Sons, Knickerbocker Press, in 1929. The second book is entitled, "Recording Sound for Motion Pictures", and was published in the year 1931 by McGraw-Hill Book Company, Inc., and was copyrighted in 1931. This book was edited by Lester Cowan for the Academy of Motion Picture Arts and Sciences. The content of the book was compiled during a period of about one

year before it was published. It contains a preface written by Mr. William C. DeMille.

Each book outlines the history of the industry and the development of the practical and technical art of sound recording for motion pictures. Each book continuously uses "sound" as the basic term, including dialogue or spoken parts as well as music and other audible manifestations.

I am, at the time of making this affidavit, still actively engaged in the industry as the head of the Sound Department of Warner Bros. Pictures, Inc. From the beginning of the sound motion picture to the present time all the machinery, equipment and accessories have been continuously known as "sound" machinery, equipment or accessories. The process is known as "sound recording". The stages are known as "sound stages". The recording and projection machinery and equipment is known as "sound heads", "sound controls", "sound recordings", and "sound systems", and in general the production of the modern photoplay is divided into two components, the visual or photographic portion and the audible or sound portion, without discrimination between the possible [73] types of sound.

NATHAN LEVINSON

Subscribed and sworn to before me, this 1st day of June, 1939.

[Seal] R. J. OBRINGER

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires August 16, 1939.

[Endorsed]: Filed Jun. 13, 1939. [74]

[Title of District Court and Cause.]

NOTICE OF MOTION TO AMEND
COMPLAINT.

To the Defendant Warner Bros. Pictures Inc., a corporation and to Freston & Files, and *William P. McGinley*, their attorneys:

You and Each of You will please take notice that the plaintiffs will move the above entitled Court in the Department of the Honorable Harry J. Hollzer on Monday, the 17th day of July, 1939 at the hour of 10 o'clock A. M. or as soon thereafter as counsel can be heard for an order amending the amended complaint on file herein in the following respects, to-wit:

1. Amending Paragraph II, page 4 line 12 so as to read "paragraphs numbered IV and V hereof" instead of merely "paragraph numbered V hereof".

2. Amending paragraph III, page 4 lines 16 to 26 so as to read as follows:

"Said dramatic composition was produced as a play under the title of "Sh—The Octopus" by the plaintiffs herein and The M. & G. Amusements Inc., a New York corporation as producing manager for the plaintiffs herein; but since long prior to the filing of this action said corporation owned or held no right, or title or interest in or to said dramatic composition or in or to either of the causes of action for infringement of copyright or [76] misappropriation or unauthorized use of the dialogue of said dra-

matic composition and play in talking motion pictures produced by the defendant Warner Bros. Pictures Inc., and these plaintiffs are the sole owners and holders of each and all said causes of action”.

Said motion will be made upon all the records and files herein and upon the affidavit of Harold A. Fendler attached hereto upon the grounds that it will be in the furtherance of justice and will correct the pleading to conform to the facts intended to be alleged and which the plaintiffs expect to prove upon the trial of this cause.

Dated at Los Angeles, California this 5th day of July, 1939.

ROGER MARCHETTI and
HAROLD A. FENDLER
By HAROLD A. FENDLER
Attorneys for Plaintiffs.

[Endorsed]: Filed Jul. 5, 1939. [77]

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT.

State of California,
County of Los Angeles—ss.

Harold A. Fendler, having been duly sworn, deposes and says: I have read the affidavit of Nathan

Levinson dated June 1, 1939 which implies that during the month of April, 1928 the term "sound" was synonymous with or inclusive of the term "dialogue or spoken parts" and that the term "sound motion pictures" was synonymous with or inclusive of "talking motion pictures".

The distinction between "sound pictures" and "talking pictures" is clarified in one of the very books cited by Levinson as reporting "with a reasonable degree of accuracy, the development of sound recording in the motion picture industry" (affidavit page 9, line 3). This book "The Film Finds Its Tongue" written by Fitzhugh Green, published by G. P. Putnam's Sons in 1929, expressly refers to the fact that although Warner Bros. had first exhibited a motion picture including dialogue as early as August, 1927:

"It was autumn of 1928 before any other company got so much as a talking sequence into a picture" (p. 306). [78]

It is apparent from Part IV of the same book which describes "The Talkie Boom: How Public Taste Ran Wild and The Effect On The Moving Picture Industry", and from Chapter XX entitled "Hollywood Panic" that in April of 1928 neither the moving picture industry nor the general public regarded the term "sound" as synonymous with or inclusive of "dialogue". The book describes in detail how other producers than Warners in May

of 1928 and for several months thereafter “went to the Victor Company or similar organizations and had their silent pictures ‘scored’ ”; and how other producers than Warners advertised “sound pictures” all over the fronts of their houses BUT “‘SOUND’ WAS NOT WHAT THE PUBLIC WANTED. THEY WANTED ‘TALK’. Warners retaliated to the ‘sound’ advertisements by switching at last to the long-barred term ‘talking picture’. They had the fronts of their theatres plastered with talking picture signs. The public here gave birth to the term ‘talkie’ ”. (p. 306).

The same history of the addition of dialogue to so-called “sound motion pictures” is described in a book of the same title by Harold B. Franklin, then president of Fox West Coast Theatres, published by Doubleday, Doran & Company in 1928 in which the author differentiates between “sound pictures” and “sound motion pictures containing dialogue”. For example, at page 31 the author comments upon the fact that it was not until the fall of 1928 when Warner Bros. took over or became associated in the management of First National Studios that First National Productions were shown “with BOTH sound AND dialogue”, (p. 31). This COMBINATION of sound WITH dialogue is referred to as an “innovation” (in the fall of 1928) “which added materially to the value of First National productions” (p. 31). The same author refers to the combination of sound with dialogue in motion

pictures as "the dialogue motion picture", or "talking motion picture (p. 367) as distinguished from what was then known as the "sound motion picture"; and at page 368 the author states: [79]

"Though sound AND dialogue pictures are now known by various names, it is expected that the American public will ultimately call them all talkies".

Another authority on the history and development of dialogue in motion pictures is a book entitled "The Talkies" by Arthur Edwin Krows, published in 1930 by Henry Holt & Company. Krows is a well known author having written such books as "Play Production in America", "Playwriting for Profit", "Equipment for Stage Production", etc. At page 32 of his book he describes the distinction between dialogue pictures known as "100% talkies" and "sound pictures" or "pictures with sound effects" such as "hoofbeats, voices of the mob, whistles of the conspirators and the like". In fact Krows repeatedly differentiates and expressly distinguishes between "sound" and "speech" in motion pictures (See page 119).

Since the year 1923 I have been employed by writers and authors to negotiate the sale of motion picture rights, dialogue rights, and other rights owned and held by dramatists and authors generally, and during the years 1926, 1927, 1928, 1929 and 1930 I spent several months of each year in New York City in various matters, some litigated and

some not, involving the negotiation and sale of said rights, and I am particularly familiar with the words, terms, and expressions used in the literary and dramatic fields during said years and am particularly familiar with the terms, expressions and phrases particular to the theatrical industry during said period of years. I have read Mr. Ralph Murphy's supplemental affidavit verified February 17, 1939 in opposition to defendants' motion for summary judgment, and wish to state of my own personal knowledge that the same is accurate and true as to the portion and each and all of the things and matters set forth therein from page 2 line 30 to, until and including page 5, line 14, and if called to the [80] witness stand in this case I can and will testify of my own personal knowledge to the truth of each and all of said averments and allegations.

HAROLD A. FENDLER

Subscribed and sworn to before me this 6th day of July, 1939.

[Seal]

FLORENCE B. MORRELL

Notary Public in and for said County and State.

[Endorsed]: Filed Jul. 7, 1939. [81]

At a stated term, to wit: The February Term, A. D. 1939, of the District Court of the United States of America, within and for the Central Division of the Southern District of California,

held at the Court Room thereof, in the City of Los Angeles on Monday the 17th day of July in the year of our Lord one thousand nine hundred and thirty-nine

Present:

The Honorable Harry A. Hollzer, District Judge.

[Title of Cause.]

This cause coming on for hearing (1) motion of the plaintiffs to amend the complaint pursuant to notice filed July 5, 1939, and (2) motion of the defendant Warner Brothers Pictures, Inc., a Corporation, for Summary Judgment, pursuant to notice filed June 13, 1939; Harold A. Fendler, Esq., appearing for the plaintiff; and John P. McGinley, Esq., appearing for the defendant:

Attorney McGinley states that defendant Warner Bros. Pictures, Inc., has no objections to the motion to amend the Complaint, but asks thirty (30) days time in which to file amendment to answer in the event that motion for Summary Judgment is denied; and Attorney McGinley states that counsel on both sides are willing to submit motion for Summary Judgment without argument.

It is now ordered that motion to amend the Complaint be granted and that the defendant have thirty (30) days after any adverse decision or motion for Summary Judgment to amend Answer.

Attorney Fendler makes a statement in opposition to motion for Summary Judgment; whereupon, it is ordered that motion of the defendant for Sum-

mary Judgment be granted, and exception is noted.
Counsel to prepare judgment. 6/690. [83]

In the District Court of the United States Southern
District of California Central Division

No. 1306-H In Equity

RALPH MURPHY, DONALD GALLAHER, and
THE M. & G. AMUSEMENTS, INC., a cor-
poration,

Plaintiffs,

vs.

FIRST NATIONAL PICTURES, INC., a corpo-
ration, WARNER BROS. PICTURES, INC.,
a corporation, et al.,

Defendants.

SUMMARY JUDGMENT

This cause came on to be heard before the Hon. Harry A. Hollzer, District Judge, presiding in the above entitled Court, at 10:00 o'clock A. M. on July 17, 1939, the plaintiffs appearing by their counsel Roger Marchetti and Harold A. Fendler by Harold A. Fendler, Esq., and defendant Warner Bros. Pictures, Inc. appearing by its counsel Freston & Files by John P. McGinley, Esq. upon the motion of the defendant Warner Bros. Pictures, Inc. for summary judgment against the plaintiffs; and the cause having been fully argued was by the Court taken under submission for decision; and it appearing to the Court from the pleadings and admissions contained therein, and from the stipula-

tions of counsel and other matters appearing of record, that on April 30, 1928, Ralph Murphy, Donald Gallaher and The M. & G. Amusements, Inc., a New York corporation, as owners, and First National Pictures, Inc., [84] a corporation, as purchaser, entered into a written agreement for the sale and purchase of the exclusive, complete and entire silent and talking motion picture rights in that certain literary material entitled "Sh! The Octopus," a copy of said agreement being attached to plaintiffs' amended complaint, marked Exhibit "1", and that prior to the commencement of the within action all right, title and interest of The M. & G. Amusements, Inc., a New York corporation, under Exhibit "1", was acquired by plaintiffs and that plaintiffs are the sole owners and holders of each of the causes of action set forth in said amended complaint; and it appearing to the Court that Warner Bros. Pictures, Inc., a corporation, prior to the commencement of the within action, succeeded to and became the owner of all right, title and interest of First National Pictures, Inc., a corporation, in and to said contract, Exhibit "1" attached to plaintiffs' amended complaint; and it further appearing to the Court that there is no genuine issue as to any material fact and that defendant Warner Bros. Pictures, Inc. is entitled to a judgment as a matter of law, the Court now finds that the merits of said motion for summary judgment are with the defendant Warner Bros. Pictures, Inc. and that said defendant as a

matter of law is entitled to a summary judgment against the plaintiffs upon the pleadings and admissions contained therein, and from the stipulations of counsel and other matters appearing of record; and, accordingly,

It is hereby ordered, adjudged and decreed:

(1) That plaintiffs are not entitled to the relief prayed for in their amended complaint or on either of the causes of action alleged in plaintiffs' amended complaint. [85]

(2) That First National Pictures, Inc., a corporation, on April 30, 1928, acquired from Ralph Murphy, Donald Gallaher and The M. & G. Amusements, Inc., a New York corporation, under the terms of the written agreement hereinabove referred to, the exclusive, complete and entire silent and talking motion picture rights in and to that certain literary material entitled "Sh! The Octopus."

(3) That Warner Bros. Pictures, Inc., a corporation, is the owner of the exclusive, complete and entire silent and talking motion picture rights in and to that certain literary material referred to in paragraph 2 hereof and entitled "Sh! The Octopus."

(4) That Warner Bros. Pictures, Inc. do have and recover its costs of action incurred herein, taxed at \$48.60.

Done in open Court this 5th day of August, 1939.

H. A. HOLLZER

Judge

Approved as to form as provided in Rule 8 of Rules of Procedure for the District Court of the United States.

ROGER MARCHETTI and
HAROLD A. FENDLER
By HAROLD A. FENDLER,
Solicitors for plaintiffs.

Judgment entered Aug. 5, 1939 Docketed Aug
5 1939 Book C. O. 1 Page 968

R. S. ZIMMERMAN,
Clerk

By L. WAYNE THOMAS,
Deputy

[Endorsed]: Filed Aug. 5, 1939. [86]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To Ralph Murphy, Donald Gallaher, and The M. & G. Amusements, Inc., a corporation, the above named Plaintiffs, and to Roger Marchetti and Harold A. Fendler, their Counsel:

You and each of you will please take notice that on August 5, 1939, there was entered in the records of the above entitled Court and cause a final Summary Judgment in favor of defendant Warner Bros. Pictures, a corporation, and against the plaintiffs Ralph Murphy, Donald Gallaher, and The M. & G. Amusements, Inc., a corporation.

Dated: August 7th, 1939.

JOHN P. MCGINLEY

Solicitor for defendant, Warner
Bros. Pictures, Inc.

FRESTON & FILES,

650 South Spring Street,
Los Angeles, California,
Of Counsel.

[Endorsed]: Filed Aug. 7, 1939. [88]

In the District Court of the United States
Southern District of California
Central Division

No. 1306-H

RALPH MURPHY, DONALD GALLAHER, and
the M. & G. AMUSEMENTS, INC., a cor-
poration,

Plaintiffs,

vs.

FIRST NATIONAL PICTURES, INC., a cor-
poration, WARNER BROS. PICTURES,
INC., a corporation, et al.,

Defendants.

NOTICE OF APPEAL

To the above entitled Court and to the Clerk
thereof:

Please take notice that the plaintiffs Ralph Mur-
phy and Donald Gallaher hereby appeal to the

United States Circuit Court of Appeals for the Ninth Circuit from the final order, judgment and decree and the whole thereof made and entered in the above entitled action on the 5th day of August, 1939.

Dated this 17th day of August, 1939.

ROGER MARCHETTI and
HAROLD A. FENDLER
By HAROLD A. FENDLER

Attorneys for Ralph Murphy
and Donald Gallaher, plain-
tiffs.

[Endorsed]: Filed Aug. 18, 1939. [90]

[Title of District Court and Cause.]

STIPULATION OMITTING VERIFICATIONS
OF PAPERS UPON RECORD ON AP-
PEAL

It is stipulated and agreed by and between the plaintiffs and appellants Ralph Murphy and Donald Gallaher and the defendant and appellee Warner Bros. Pictures Inc., a corporation, that the Clerk of the above entitled Court in making up the record on appeal from the summary judgment dated August 5, 1939, shall omit all verifications, simply designating all verified pleadings and affidavits as "duly verified" and said Clerk shall omit the title of the Court and cause upon all papers except the notice and petition on appeal.

Dated this 14th day of August, 1939.

ROGER MARCHETTI and

HAROLD A. FENDLER

By HAROLD A. FENDLER

Attorneys for plaintiffs and appellants

FRESTON & FILES

By RALPH E. LEWIS

Attorneys for defendant and appellee

Warner Bros. Pictures Inc.

[Endorsed]: Filed Aug. 18, 1939. [92]

[Title of District Court and Cause.]

PLAINTIFFS' DESIGNATION OF DOCUMENTS TO BE INCLUDED IN THE RECORD ON APPEAL

To the Clerk of the above entitled Court:

Now comes Ralph Murphy and Donald Gallaher, the above named plaintiffs, and designate and request the following documents to be included in the transcript of the record on appeal herein from the summary judgment dated August 5, 1939, which documents plaintiffs believe necessary to the proper determination of the case on appeal and which plaintiffs request and require to be made a part of said record on appeal:

1. Amended complaint as amended pursuant to minute order dated July 17, 1939.
2. Answer of defendant Warner Bros. Pictures Inc.

3. Defendants' motion for summary judgment dated Jan. 6, 1939, including affidavit of R. W. Perkins verified Nov. 30, 1938 (omitting re-printing of copy of agreement dated April 30, 1928, between Donald Gallaher, Ralph Murphy, the M. & G. Amusements, Inc., and First National Pictures Inc. attached to the said affidavit marked Exhibit "A"; but including Exhibits B, C, D attached to said affidavit).

4. Minute Order dated Feb. 20, 1939, denying without prejudice said motion for summary judgment. [94]

5. Notice of and motion for summary judgment dated June 12, 1939, including affidavit of Nathan Levinson verified June 1, 1939.

6. Affidavit of Ralph Murphy and Donald Gallaher in opposition to motion for summary judgment verified Jan. 10, 1939.

7. Supplemental affidavit of Donald Gallaher in opposition to motion for summary judgment verified Feb. 20, 1939.

8. Supplemental affidavit of Ralph Murphy in opposition to defendants' motion for summary judgment verified Feb. 17, 1939.

9. Supplemental affidavit of Harold A. Fendler in opposition to defendants' motion for summary judgment verified July 6, 1939.

10. Notice of Motion to amend complaint dated July 5, 1939.

11. Minute order dated July 17, 1939.

12. Summary judgment dated August 5, 1939.

13. Notice of entry of judgment dated August 7, 1939.
14. Notice of Appeal.
15. Plaintiff's designation of documents to be included in the record on appeal.
16. Supersedeas bond on appeal.
17. Stipulation dated August 9, 1939, omitting verifications of papers upon record on appeal.

Dated this 15th day of August, 1939.

ROGER MARCHETTI and
HAROLD A. FENDLER,
By HAROLD A. FENDLER,
Attorneys for plaintiffs
Ralph Murphy and Donald
Gallaher.

[Endorsed]: Filed Aug. 18, 1939. [95]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service of Notice of Appeal dated August 17, 1939, and service of Designation of Documents to be included in the record on appeal dated August 15, 1939, is hereby acknowledged and receipt of copies thereof is hereby acknowledged by the undersigned.

Dated at Los Angeles, California, this 17th day of August, 1939.

FRESTON & FILES,
By RALPH E. LEWIS.

[Endorsed]: Filed Aug. 25, 1939. [97]

[Title of District Court and Cause.]

No. 4390737

SUPERSEDEAS AND COST BOND
ON APPEAL.

(The premium charged for this bond is \$10.00 per annum).

Know All Men By These Presents:

That the undersigned Fidelity and Deposit Company of Maryland, a corporation, as Surety, is held and firmly bound unto the above named defendant Warner Bros. Pictures Inc., a corporation, in the sum of Two Hundred Fifty Dollars (\$250.00) for the payment of which, well and truly to be made, it binds itself, its successors and assigns, firmly by these presents; for that

Whereas, a Summary Judgment has been duly entered in the above entitled proceedings in the District Court of the United States for the Southern District of California, Central Division, on the 7th day of August, 1939, in favor of the defendant Warner Bros. Pictures Inc., and against the plaintiffs and appellants Ralph Murphy and Donald Gallaher and said plaintiffs have appealed from said judgment to the Ninth Circuit Court of Appeals;

Now Therefore, the condition of this obligation is such that if said appellants Ralph Murphy and Donald Gallaher shall prosecute their appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and [98] effect; and in the event of default or contumacy on the part of the said Ralph

Murphy and Donald Gallaher and of the under-
signed surety, the court may, upon notice to them
of not less than ten days, proceed summarily and
render judgment against them or either of them in
accordance with their obligation and award execu-
tion thereon.

Dated this 22nd day of September, 1939.

FIDELITY & DEPOSIT CO.
OF MARYLAND, a corporation,
By W. H. CANTWELL,
Attorney in Fact.

Attest:

THERESA FITZGIBBONS,
Agent.

State of California,
County of Los Angeles—ss.

On this 22nd day of September, 1939, before me,
S. M. Smith, a Notary Public, in and for the said
County of Los Angeles, State of California, resid-
ing therein, duly commissioned and sworn, person-
ally appeared W. H. Cantwell, known to me to be
the Attorney-in-Fact, and Theresa Fitzgibbons,
known to me to be the Agent of the Fidelity and
Deposit Company of Maryland, the corporation that
executed the within instrument, and acknowledged
to me that they subscribed the name of the Fidelity
and Deposit Company of Maryland thereto and
their own names as Attorney-in-Fact and Agent,
respectively.

S. M. SMITH,
Notary Public in and for the County of Los An-
geles, State of California.

Examined and recommended for approval as provided in Rule 13.

ROGER MARCHETTI and
HAROLD A. FENDLER,
By HAROLD A. FENDLER.

The foregoing cost and supersedeas bond on appeal and the form and sufficiency thereof are hereby approved this 22nd day of September, 1939.

H. A. HOLLZER,

U. S. District Judge. [99]

[Endorsed]: Filed Sept. 25, 1939. [100]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages, numbered from 1 to 98, inclusive, contain full, true and correct copies of the Amended Complaint; Motion for Summary Judgment; Affidavit in Opposition to Motion for Summary Judgment; Minute Order of February 20, 1939; Supplemental Affidavit of Plaintiff Donald Gallaher; Supplemental Affidavit of Plaintiff Ralph Murphy; Answer of Defendant Warner Bros. Pictures, Inc.; Notice of and Motion for Summary Judgment; Notice of Motion to Amend Complaint; Supplemental Affidavit in Opposition to Motion for Summary Judgment; Minute Order of July 17, 1939; Summary Judgment; Notice of Entry of Judgment; Notice of Ap-

peal; Stipulation Omitting Verifications; Plaintiffs' Designation of record on appeal; Supersedeas Bond on Appeal and Acknowledgment of Service of Notice of Appeal, which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I Do Further Certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to \$13.50, and that said amount has been paid me by the Appellants herein.

Witness my hand and the Seal of the District Court of the United States for the Southern District of California, this 25th day of September, A. D. 1939.

[Seal] R. S. ZIMMERMAN,

Clerk,

By EDMUND L. SMITH,

Deputy Clerk.

[Endorsed]: No. 9304. United States Circuit Court of Appeals for the Ninth Circuit. Ralph Murphy and Donald Gallaher, Appellants, vs. Warner Bros. Pictures, Inc., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed September 26, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit.

No. 9304

RALPH MURPHY and DONALD GALLAHER,
Appellants,

vs.

WARNER BROS. PICTURES, INC.,
a corporation,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY
UPON APPEAL.

Now come the appellants Ralph Murphy and Donald Gallaher, and state the following points upon which they will rely in the prosecution of their appeal from the judgment made and entered in the District Court of the United States, Southern District of California, Central Division, on the 5th day of August, 1939, and which judgment did order, adjudge and decree that these appellants were not entitled to the relief prayed for in their amended complaint and that appellee Warner Bros. Pictures Inc. do have and recover its costs incurred in said action as follows:

I.

The court erred in determining that appellants were not entitled to the relief prayed for in their amended complaint.

II.

The court erred in determining that the appellants were not entitled to relief upon the first cause of action alleged in their amended complaint.

III.

The court erred in determining that appellants were not entitled to the relief upon the second cause of action alleged in their amended complaint.

IV.

The court erred in determining that First National Pictures, Inc., a corporation, on April 30, 1928, acquired from these appellants the talking motion picture rights in and to that certain literary material entitled "Sh—The Octopus".

V.

The court erred in determining that Warner Bros. Pictures Inc., a corporation, was or is the owner of the talking motion picture rights in and to that certain literary material entitled "Sh—The Octopus".

VI.

That Paragraph numbered II contained in said summary judgment reading as follows:

"(2) That First National Pictures, Inc., a corporation, on April 30, 1928, acquired from Ralph Murphy, Donald Gallaher and The M. & G. Amusements, Inc., a New York corporation, under the terms of the written agreement hereinabove referred to, the exclusive, complete and

entire silent and talking motion picture rights in and to that certain literary material entitled 'Sh! The Octopus!' ”,

is not supported by the evidence and is contrary to and against law.

VII.

That paragraph numbered III contained in said summary judgment reading as follows:

“(3) That Warner Bros. Pictures, Inc., a corporation, is the owner of the exclusive, complete and entire silent and talking motion picture rights in and to that certain literary material referred to in paragraph 2 hereof and entitled 'Sh! The Octopus' ”,

is not supported by the evidence and is contrary to and against law.

VIII.

That said summary judgment is contrary to the evidence and contrary to law in holding that on April 30, 1928, appellants and the M. & G. Amusements, Inc., a New York corporation, as owners and First National Pictures, Inc., a corporation, as purchaser, entered into a written agreement for the sale and purchase of the exclusive, complete and entire silent and talking motion picture rights in that certain literary material entitled “Sh! The Octopus” a copy of said agreement being attached to appellants' amended complaint, marked Exhibit “1”,

IX.

That the court erred as a matter of law in holding that there was no genuine issue as to any material fact alleged in appellants' amended complaint.

X.

That the court erred as a matter of law in holding that the appellee was entitled to judgment as a matter of law.

XI.

That the court erred as a matter of law in finding that the merits of said motion for summary judgment were with the appellee.

XII.

That the court erred as a matter of law in holding that the appellee was entitled to a summary judgment against appellants upon the pleadings and other matters appearing of record.

XIII.

That the contract dated April 30, 1928, is governed by the laws and decisions of the state of New York and the law of the State of New York is contrary to the construction and interpretation given by the trial court to the said contractor.

XIV.

That the allegations contained in the amended complaint relating to well settled trade custom and usage known to the contracting parties and intended by them to apply to their contract dated April 30,

1928, by and between appellants and the M. & G. Amusements, Inc., a corporation, as owners, and First National Pictures Inc., a corporation, as purchaser, were not conclusions of law but allegations of fact to be proved upon the trial and which were intended to and did become an integral and essential part of said contract.

XV.

That the trial court erred in holding that "sound rights" in 1928 were synonymous with "dramatic rights" and "dialogue rights" or "talking motion picture rights".

XVI.

That the trial court erred in holding and determining that declarations by a former agent after his employment terminated were competent evidence against his former employer.

XVII.

That the trial court contrary to law substituted a trial by affidavits in place and stead of a trial upon legal evidence and abused its discretion in granting said motion for summary judgment.

XVIII.

That the trial court erred as a matter of law and abused its discretion in disregarding substantial conflict in affidavits submitted upon substantial issues raised by the pleadings and in holding that such

controverted facts and issues might be determined without hearing evidence and without trial.

Respectfully submitted,

ROGER MARCHETTI and

HAROLD A. FENDLER,

By HAROLD A. FENDLER,

Attorneys for appellants

Ralph Murphy and Donald

Gallaher.

Received copy of the within

FRESTON & FILES.

This 25th day of Sept., 1939.

[Endorsed]: Filed Sept. 26, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS' DESIGNATION OF DOCUMENTS TO BE INCLUDED IN THE RECORD ON APPEAL.

To the Clerk of the Above Entitled Court:

Now comes Ralph Murphy and Donald Gallaher, the above named appellants, and designate and request the following documents to be included in the transcript of the record on appeal herein from the summary judgment dated August 5, 1939, entered August 7, 1939, which documents appellants believe necessary to the proper determination of the case on appeal and which appellants request and require to be made a part of said record on appeal:

1. Amended complaint as amended pursuant to minute order dated July 17, 1939.

2. Answer of appellee Warner Bros. Pictures Inc.

3. Appellee's motion for summary judgment dated Jan. 6, 1939, including affidavit of R. W. Perkins verified Nov. 30, 1938 (omitting re-printing of copy of agreement dated April 30, 1928, between Donald Gallaher and Ralph Murphy, and First National Pictures, Inc., attached to the said affidavit marked Exhibit "A"; but including Exhibits B, C, D attached to said affidavit).

4. Minute Order dated Feb. 20, 1939, denying without prejudice appellee's said motion for summary judgment.

5. Notice of appellee's motion for summary judgment dated June 12, 1939, including affidavit of Nathan Levinson verified June 1, 1939.

6. Affidavit of Ralph Murphy and Donald Gallaher in opposition to motion for summary judgment verified Jan. 10, 1939.

7. Supplemental affidavit of Donald Gallaher in opposition to motion for summary judgment verified Feb. 20, 1939.

8. Supplemental affidavit of Ralph Murphy in opposition to appellee's motion for summary judgment verified Feb. 17, 1939.

9. Supplemental affidavit of Harold A. Fendler in opposition to appellee's motion for summary judgment verified July 6, 1939.

10. Notice of appellants' motion to amend complaint dated July 5, 1939.

11. Minute order dated July 17, 1939.
12. Summary judgment dated August 5, 1939.
13. Notice of entry of judgment dated August 7, 1939.
14. Notice of Appeal.
15. Appellant's designation of documents to be included in the record on appeal.
16. Supersedeas bond on appeal.
17. Stipulation dated August 9, 1939, omitting verifications of papers upon record on appeal.
18. Acknowledgment of service upon appeal of notice of appeal and designation of documents.
19. Appellant's designation of documents to be included in the record on appeal.
20. Statement of appellants of points upon which they intend to rely upon appeal.

Dated this 18th day of September, 1939.

ROGER MARCHETTI and
HAROLD A. FENDLER,
By HAROLD A. FENDLER,
Attorneys for appellants
Ralph Murphy and Donald
Gallaher.

Received copy of the within Appellants' Designation of Documents to Be Included in the Record on Appeal this 18th day of September, 1939.

FRESTON & FILES,
By JOHN P. MCGINLEY,
Attorney for Warner Bros. Pict., Inc.

[Endorsed]: Filed Sept. 26, 1939. Paul P. O'Brien, Clerk.

of the country, and the people of the country.

It is the duty of the government to protect the rights of the people, and to promote the general welfare of the country.

The government is responsible for the safety and security of the people, and for the maintenance of the law.

The government is also responsible for the promotion of the economic and social progress of the country.

The government is the servant of the people, and not the master.

The government is the guardian of the rights and liberties of the people.

The government is the protector of the weak and the oppressed.

The government is the defender of the people against the enemies of the country.

The government is the promoter of the public good.

The government is the maintainer of the peace and order of the country.

The government is the provider of the public services.

The government is the creator of the public works.

The government is the builder of the public institutions.

The government is the promoter of the public education.

The government is the provider of the public health services.

The government is the maintainer of the public order.